Supreme Court, U.S.
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No. 16-1161

In the Supreme Court of the United States

BEVERLY R. GILL, ET AL., APPELLANTS,

v.

WILLIAM WHITFORD, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

JOINT APPENDIX

VOLUME I

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Appeal Docketed March 24, 2017
Jurisdiction Postponed June 19, 2017

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U.S. District Court
Western District of Wisconsin (Madison)
CIVIL DOCKET FOR CASE #:
3:15-cv-00421-bbc
Case Title: Whitford, William, et al. v. Nichol, Gerald et al.
Date Filed: July 8, 2015

Assigned to: District Judge Barbara B. Crabb

Date	#	Docket Text
07/08/2015	1	COMPLAINT against All Defendants, filed by All Plaintiffs. *(Attachments omitted)* (Earle, Peter) Modified on 7/8/2015. (Entered: 07/08/2015)
08/18/2015	24	Notice of Motion and MOTION TO DISMISS by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol, Timothy Vocke. (Keenan, Brian) Modified on 8/18/2015. (kwf) (Entered: 08/18/2015)

08/08/2015	25	Brief in Support of 24 Motion to Dismiss by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol, Timothy Vocke. (Keenan, Brian) (Entered: 08/18/2015)
09/29/2015	30	ORDER appointing Circuit Judge Kenneth F. Ripple and Chief District Judge William C. Griesbach, of the Eastern District of Wisconsin, as additional members of the three-judge court. Signed by District Judge Diane P. Wood, Chief Judge USCA for the seventh circuit on 9/23/2015. (voc) (Entered: 09/29/2015)
09/29/2015	31	Brief in Opposition by Plaintiffs Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, William Whitford, Donald Winter re: 24 Motion to Dismiss filed by Gerald C. Nichol, Harold V. Froehlich, Timothy Vocke, John

		Franke, Elsa Lamelas, Kevin J. Kennedy, Thomas Barland. (Odorizzi, Michele) (Entered: 09/29/2015)
10/09/2015	32	Brief in Reply by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol, Timothy Vocke in Support of 24 Motion to Dismiss. (Keenan, Brian) (Entered: 10/09/2015)
10/15/2015	33	Pretrial Conference Order – Oral Argument on Motion to Dismiss 24 set for 11/4/2015 at 01:30 PM before the Three Judge Panel. Dispositive Motions due 1/4/2016. Final Pretrial Submissions due 4/25/2016. Joint Pretrial Statement and Each Party's Statement of Facts with Proposed Special Verdict Form due 5/9/2016. Trial Brief and Five Complete sets of Pre-marked Trial Exhibits due 5/16/2016. Court Trial set for 5/23/2016 at 09:00 AM before the Three Judge Panel. Signed by Magistrate Judge Stephen L.

		Crocker on 10/15/15. (jat) (Entered: 10/15/2015)
11/23/2015	39	Defendant's Supplement to 24 Motion to Dismiss filed by Gerald C. Nichol, Harold V. Froehlich, Timothy Vocke, John Franke, Elsa Lamelas, Kevin J. Kennedy, Thomas Barland. (Russomanno, Anthony) Modified on 11/23/2015. (lak) (Entered: 11/23/2015)
11/23/2015	40	Plaintiff's Supplement to 24 Motion to Dismiss filed by Gerald C. Nichol, Harold V. Froehlich, Timothy Vocke, John Franke, Elsa Lamelas, Kevin J. Kennedy, Thomas Barland. (Odorizzi, Michele) Modified on 11/24/2015. (lak) (Entered: 11/23/2015)
11/30/2015	41	Reply by Plaintiffs Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, William Whitford, Donald Winter re: 24 Motion to Dismiss. *(Plaintiffs*

		Reply to Defendants' Supplemental Brief on Standing.) (Odorizzi, Michele) Modified on 12/1/2015. (lak) (Entered: 11/30/2015)
11/30/2015	42	Reply by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol, Timothy Vocke re: 24 Motion to Dismiss. *(Response Brief on Standing.)* (Keenan, Brian) Modified on 12/1/2015. (lak) (Entered: 11/30/2015)
12/17/2015	43	ORDER denying 24 Motion to Dismiss by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol, Timothy Vocke. Signed by District Judge Barbara B. Crabb on 12/17/2015. (voc) (Entered: 12/17/2015)
12/30/2015	44	ANSWER by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa

		Lamelas, Gerald C. Nichol, Timothy Vocke. (Keenan, Brian) (Entered: 12/30/2015)
01/04/2016	45	**MOTION FOR SUMMARY JUDGMENT** by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol, Timothy Vocke. Brief in Opposition due 1/25/2016. Brief in Reply due 2/4/2016. (Keenan, Brian) (Entered: 01/04/2016)
01/04/2016	46	Brief in Support of 45 Motion for Summary Judgment, by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol, Timothy Vocke. (Keenan, Brian) (Entered: 01/04/2016)
01/04/2016	49	Declaration of Brian Keenan filed by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol, Timothy Vocke re: 45 Motion for Summary

		Judgment, *(Attachments omitted)*. (Keenan, Brian) Modified on 1/5/2016. (lak) (Entered: 01/04/2016)
01/04/2016	50	Declaration of Nicholas Goedert filed by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol, Timothy Vocke re: 45 Motion for Summary Judgment, *(Attachments omitted)*. (Keenan, Brian) Modified on 1/5/2016. (lak) (Entered: 01/04/2016)
01/05/2016	51	Expert Report of Nicholas Goedert by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol, Timothy Vocke, *(Attachments omitted)*. (Keenan, Brian) Modified on 1/5/2016. (lak) (Entered: 01/05/2016)
01/05/2016	54	Expert Report of Kenneth Mayer by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald

		C. Nichol, Timothy Vocke. (Keenan, Brian) Modified on 1/5/2016: Exhibits/Annex are not attached separately. (lak) (Entered: 01/05/2016)
01/05/2016	55	Declaration of Sean Trende filed by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol, Timothy Vocke re: 45 Motion for Summary Judgment, *(Attachments omitted)* (Keenan, Brian) Modified on 1/5/2016. (lak) (Entered: 01/05/2016)
01/15/2016	56	AMENDED ANSWER by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol, Timothy Vocke. (Keenan, Brian) Modified on 1/18/2016. (lak) (Entered: 01/15/2016)
01/22/2016	58	Declaration of Simon David Jackman filed by Plaintiffs Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue

		Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, William Whitford, Donald Winter re: 45 Motion for Summary Judgment, *(Attachments omitted)* (Odorizzi, Michele) Modified on 1/25/2016: Clarified exhibit descriptions. (lak) (Entered: 01/22/2016)
01/22/2016	59	Declaration of Kenneth Mayer filed by Plaintiffs Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, William Whitford, Donald Winter re: 45 Motion for Summary Judgment, *(Attachments omitted)* (Odorizzi, Michele) Modified on 1/25/2016: Clarified exhibit descriptions. (lak) (Entered: 01/22/2016)
01/25/2016	62	Expert Report of Simon David Jackman by Plaintiffs Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison

		Seaton, James Seaton, Jerome Wallace, William Whitford, Donald Winter. (Odorizzi, Michele) (Entered: 01/25/2016)
01/25/2016	63	Expert Report of Simon David Jackman (Rebuttal) by Plaintiffs Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, William Whitford, Donald Winter. (Odorizzi, Michele) (Entered: 01/25/2016)
01/25/2016	64	Expert Report of Kenneth Mayer (Rebuttal) by Plaintiffs Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, William Whitford, Donald Winter. (Odorizzi, Michele) (Entered: 01/25/2016)
01/25/2016	65	Deposition of Nicholas Goedert taken on 12/15/15, *(Attachments*

		omitted) (Odorizzi, Michele) (Entered: 01/25/2016)
01/25/2016	68	Brief in Opposition by Plaintiffs Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, William Whitford, Donald Winter re: 45 Motion for Summary Judgment, filed by Gerald C. Nichol, Harold V. Froehlich, Timothy Vocke, John Franke, Elsa Lamelas, Kevin J. Kennedy, Thomas Barland. (Odorizzi, Michele) (Entered: 01/25/2016)
02/04/2016	73	Brief in Reply by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol, Timothy Vocke in Support of 45 Motion for Summary Judgment. (Keenan, Brian) (Entered: 02/04/2016)
03/23/2016	86	Minute Entry for proceedings held before District Judge Barbara B.

		Crabb, Circuit Judge Kenneth F. Ripple and Chief District Judge William C. Griesbach: Oral Argument Hearing held on 3/23/2016 re 45 Motion for Summary Judgment by defendants. [2:12] (Court Reporter LS.) (voc) (Entered: 03/23/2016)
03/25/2016	89	Transcript of Motion Hearing, held 3/23/2016 before Judge Kenneth Ripple, Judge Barbara B. Crabb and Judge William Griesbach. (voc) (Entered: 03/25/2016)
04/07/2016	94	ORDER: IT IS ORDERED that The motion for summary judgment filed by defendants Gerald C. Nichol, Thomas Barland, John Franke, Harold V. Froehlich, Elsa Lamelas, Timothy Vocke and Kevin J. Kennedy, dkt. # 45 , is DENIED. The motion filed by plaintiffs William Whitford, Roger Anclam, Emily Bunting, Mary Lynne Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, James Seaton, Allison Seaton, Jerome Wallace and Don

		Winter to exclude the opinions of Sean Trende, dkt. # 70, is DENIED WITHOUT PREJUDICE to plaintiffs' refiling it at the conclusion of trial. Trial will begin on Tuesday, May, 24, 2016 and should be completed by Friday, May 27, 2016. If the parties believe that is not a sufficient amount of time, they should explain their concerns in writing no later than April 18, 2016. Signed by Circuit Judge Kenneth F. Ripple, District Judge Barbara B. Crabb and District Judge William C. Griesbach on 4/7/2016. (voc) (Entered: 04/07/2016)
04/18/2016	95	Amended Expert Report of Kenneth Mayer (Rebuttal), Updated March 31, 2016, by Plaintiffs Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, William Whitford, Donald Winter.

		(Greenwood, Ruth) (Entered: 04/18/2016)
05/09/2016	125	Joint Final Pretrial Conference Report by Plaintiffs Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, William Whitford, Donald Winter. (Greenwood, Ruth) Modified on 5/10/2016: Requested exhibit lists and deposition designations be filed as separate docket entries. Exhibit lists also filed at 102 and 103 . (lak) (Entered: 05/09/2016)
05/10/2016	130	Exhibit List by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol, Timothy Vocke. (Keenan, Brian) (Entered: 05/10/2016)
05/16/2016	133	Trial Brief by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol,

Timothy Vocke. (Keenan, Brian) (Entered: 05/16/2016)

05/16/2016 134 Trial Brief by Plaintiffs Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, William Whitford, Donald Winter. (Greenwood, Ruth) (Entered: 05/16/2016)

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		Ripple, District Judge Barbara B. Crabb and District Judge William C. Griesbach: First Day of Court Trial held on 5/24/2016. Evidence entered, trial continues. [6:45] (arw) (Entered: 05/25/2016)
05/26/2016	142	Minute Entry for proceedings held before Circuit Judge Kenneth F. Ripple, District Judge Barbara B. Crabb and District Judge William C. Griesbach: Second Day of Court Trial held on 5/25/2016. Evidence entered, trial continues. [6:57] (arw) (Entered: 05/26/2016)
05/26/2016	143	Minute Entry for proceedings held before Circuit Judge Kenneth F. Ripple, District Judge Barbara B. Crabb and District Judge William C. Griesbach: Third Day of Court Trial held on 5/26/2016. Evidence entered, trial continues. [7:08] (Entered: 05/26/2016)
05/27/2016	145	Minute Entry for proceedings held before Circuit Judge Kenneth F. Ripple, District Judge Barbara B. Crabb and District Judge William

C. Griesbach: Fourth Day of Court Trial held on 5/27/2016. Trial completed, briefing set: Post-trial briefs due 6/10/2016, Replies due 6/20/2016. [6:35] (arw) (Entered: 05/27/2016)

05/27/2016	146	Court Trial Exhibit List. (arw) (Entered: 05/27/2016)
06/08/2016	147	Transcript of First Day of Court Trial, held 5/24/2016 before Judge Barbara B. Crabb. Court Reporter: LS. (voc) (Entered: 06/08/2016)
06/08/2016	148	Transcript of Second Day of Jury Trial, held 5/25/2016 before Judge Barbara B. Crabb. Court Reporter: LS. (voc) (Entered: 06/08/2016)
06/08/2016	149	Transcript of Third Day of Jury Trial, held 5/26/2016 before Judge Barbara B. Crabb. Court Reporter: LS. (voc) (Entered: 06/08/2016)
06/10/2016	150	Transcript of Fourth Day of Court Trial, held 5/27/16 before Judge Barbara B. Crabb, Judge Kenneth

Ripple, and Judge William Griesbach. Court Reporter: LS. (jat) (Entered: 06/10/2016)

06/10/2016 153 Post Trial Brief by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol, Timothy Vocke. (Keenan, Brian) (Entered: 06/10/2016)

06/10/2016 155 Post Trial Brief by Plaintiffs Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, William Whitford, Donald Winter. (Greenwood, Ruth) (Entered: 06/10/2016)

06/20/2016 156 Post Trial Brief by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol, Timothy Vocke. (Keenan, Brian) (Entered: 06/20/2016)

06/20/2016	157	Post Trial Brief *(Reply)* by Plaintiffs Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, William Whitford, Donald Winter. (Harless, Annabelle) (Entered: 06/20/2016)
11/21/2016	166	OPINION and ORDER. Signed by Judges Kenneth F. Ripple, Barbara B. Crabb and William C. Griesbach. Signed by District Judge Barbara B. Crabb on 11/21/2016. (voc) (Entered: 11/21/2016)
12/21/2016	169	Response re: 166 OPINION and ORDER. *Brief on Remedy* by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol, Timothy Vocke. (Keenan, Brian) Modified on 12/22/2016. (lak) (Entered: 12/21/2016)
12/21/2016	170	Response re: 166 OPINION and ORDER. *Brief on Remedies* by

		Plaintiffs Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, William Whitford, Donald Winter, *(Attachments omitted)* Modified on 12/22/2016. (lak) (Entered: 12/21/2016
01/05/2017	173	Response re: 166 OPINION and ORDER. *Response Brief on Remedies* by Defendants Thomas Barland, John Franke, Harold V. Froehlich, Kevin J. Kennedy, Elsa Lamelas, Gerald C. Nichol, Timothy Vocke. (Keenan, Brian) Modified on 1/5/2017. (lak) (Entered: 01/05/2017)
01/05/2017	174	Response re: 166 OPINION and ORDER. *Response Brief on Remedies* by Plaintiffs Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, William Whitford, Donald

		Winter. (Harless, Annabelle) Modified on 1/6/2017. (lak) (Entered: 01/05/2017)
01/27/2017	182	OPINION and ORDER. Signed by Judges Kenneth F. Ripple, Barbara B. Crabb and William C. Griesbach on 1/27/2017. (voc) (Entered: 01/27/2017)
01/27/2017	183	JUDGMENT entered in favor of Plaintiffs Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, William Whitford, Donald Winter dismissing the case. (voc) (Entered: 01/27/2017)
02/06/2017	185	Motion to Alter or Amend Judgment *to Retain Jurisdiction Regarding Remedy* by Plaintiffs Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome

		Wallace, William Whitford, Donald Winter. *(Attachments omitted)* (Poland, Douglas) (Entered: 02/06/2017)
02/14/2017	187	Brief in Opposition by Defendants Beverly R. Gill, Julie M. Glancey, Ann S. Jacobs, Steve King, Don Millis, Mark L. Thomsen re: 185 Motion to Alter or Amend Judgment, filed by Jerome Wallace, Allison Seaton, Helen Harris, Donald Winter, James Seaton, Emily Bunting, Wayne Jensen, William Whitford, Janet Mitchell, Wendy Sue Johnson, Mary Lynn Donohue, Roger Anclam. (Keenan, Brian) (Entered: 02/14/2017)
02/16/2016	188	Brief in Reply by Plaintiffs Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, William Whitford, Donald Winter in Support of 185 Motion to Alter or Amend Judgment. (Harless, Annabelle) (Entered: 02/16/2017)

02/22/2017	189	ORDER granting 185 Motion to Alter or Amend Judgment to Retain Jurisdiction Regarding Remedy. Signed by Judges Kenneth F. Ripple, Barbara B. Crabb and William C. Griesbach on 2/22/2016. (voc) (Entered: 02/22/2017)
02/22/2017	190	AMENDED JUDGMENT entered in favor of Plaintiffs Roger Anclam, Emily Bunting, Mary Lynne Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, William Whitford, Donald Winter dismissing the case. (voc) (Entered: 02/22/2017)
02/24/2017	191	NOTICE OF APPEAL by Defendants Beverly R. Gill, Julie M. Glancey, Ann S. Jacobs, Steve King, Don Millis, Mark L. Thomsen as to 182 Order, 190 Judgment. Filing fee of $ 505, receipt number 0758–1977883 paid. No Docketing Statement filed. (Keenan, Brian) (Entered: 02/24/2017)

03/15/2017	192	Judgment Corrected Pursuant to Rule 60(a) to correct the inadvertent omission of court approval of form as required by Rule 58(b)(2) (BBC /PAO). (voc) (Entered: 03/15/2017)
03/20/2017	193	AMENDED NOTICE OF APPEAL by Defendants Beverly R. Gill, Julie M. Glancey, Ann S. Jacobs, Steve King, Don Millis, Mark L. Thomsen as to 190 Judgment, 192 Judgment, 183 Judgment. Filing fee of $ 505, receipt number 0758–1977883 paid. No Docketing Statement filed. (Keenan, Brian) (Entered: 03/20/2017)

Complaint for Declaratory and Injunctive Relief

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, ROGER ANCLAM, EMILY BUNTING, MARY LYNNE DONOHUE, HELEN HARRIS, WAYNE JENSEN, WENDY SUE JOHNSON, JANET MITCHELL, ALLISON SEATON, JAMES SEATON, JEROME WALLACE, and DONALD WINTER,	)	No.
Plaintiffs,	)	
v.	)	Three Judge Panel Requested
GERALD C. NICHOL, THOMAS BARLAND, JOHN FRANKE, HAROLD V. FROEHLICH, KEVIN J. KENNEDY, ELSA LAMELAS, and TIMOTHY VOCKE,	)	28 U.S.C. 2284(a)

Defendants.)
)
)

NOW COME Plaintiffs William Whitford, Roger Anclam, Emily Bunting, Mary Lynne Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, and Donald Winter, by their undersigned attorneys, and complain of Defendants Gerald C. Nichol, Thomas Barland, John Franke, Harold V. Froehlich, Elsa Lamelas, Kevin J. Kennedy, and Timothy Vocke, not personally, but solely in their official capacities as members of the Wisconsin Government Accountability Board, as follows:

INTRODUCTION

1. Plaintiffs seek both a declaratory judgment that the Wisconsin State Assembly district plan adopted in 2012 by Wisconsin Act 43 (the "Current Plan") violates the First and Fourteenth Amendments of the United States Constitution and an order permanently enjoining the implementation of the Current Plan in the 2016 election. As explained in greater detail below, the Current Plan is, by any measure, one of the worst partisan gerrymanders in modern American history. In the first election in which it was in force in 2012, the Current Plan enabled Republican candidates to win sixty of the Assembly's ninety-nine seats even though Democratic candidates won a ***majority*** of the statewide Assembly

vote. The evidence is overwhelming that the Current Plan was adopted to achieve precisely that result: indeed, before submitting the map for approval, the Republican leadership retained an expert (at State expense) who predicted the partisan performance of each proposed district—as it turned out, with remarkable accuracy.

2. This kind of partisan gerrymandering is both unconstitutional and profoundly undemocratic. It is unconstitutional because it treats voters unequally, diluting their voting power based on their political beliefs, in violation of the Fourteenth Amendment's guarantee of equal protection, and because it unreasonably burdens their First Amendment rights of association and free speech. Extreme partisan gerrymandering is also contrary to core democratic values because it enables a political party to win more legislative districts—and thus more legislative power—than is warranted by that party's popular support. By distorting the relationship between votes and assembly seats, it causes policies to be enacted that do not accurately reflect the public will. In the end, a political minority is able to rule the majority and to entrench itself in power by periodically manipulating election boundaries.

3. Partisan gerrymandering has increased throughout the United States in recent years as a result of both a rising tide of partisanship and greater technological sophistication, which enables maps to be drawn in ways that are likely to enable the party

in power to remain in power even if it no longer represents the views of the majority of voters. This nationwide trend threatens a "'core principle of republican government,' namely, 'that the voters should choose their representatives, not the other way around.'" *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, No. 13-1314 (U.S. June 29, 2015), slip op. at 35.

4. The United States Supreme Court has recognized that partisan gerrymandering can be unconstitutional. Nevertheless, a constitutional challenge has yet to succeed on that ground because plaintiffs have been unable to offer a workable standard to distinguish between permissible political line-drawing and unconstitutional partisan gerrymandering. In this case, plaintiffs propose a new test that is workable, based on the concept of partisan symmetry—the idea that a district plan should treat the major parties symmetrically with respect to the conversion of votes to seats and that neither party should have a systematic advantage in how efficiently its popular support translates into legislative power.

5. One way to measure a district plan's performance in terms of partisan symmetry is to determine whether there is an "efficiency gap" between the performances of the two major parties and, if so, to compare the magnitude of that gap to comparable district plans in the modern era nationwide. The efficiency gap captures in a single

number all of a district plan's ***cracking*** and ***packing***—the two fundamental ways in which partisan gerrymanders are constructed. Cracking means dividing a party's supporters among multiple districts so that they fall short of a majority in each one. Packing means concentrating one party's backers in a few districts that they win by overwhelming margins. Both cracking and packing result in "wasted" votes: votes cast either for a losing candidate (in the case of cracking) or for a winning candidate but in excess of what he or she needed to prevail (in the case of packing). The efficiency gap is the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast.

6. When the efficiency gap is relatively small and roughly equivalent to the efficiency gaps that have traditionally existed, the map should not be deemed unconstitutional. In such cases, there may be no intent to treat voters unequally; in any event, the effects of any gerrymandering are likely to be redressable through the political process. But where the efficiency gap is large and much greater than the historical norm, there should be a presumption of unconstitutionality. In such a case, an intent to systematically disadvantage voters based on their political beliefs can be inferred from the severity of the gerrymander alone. And because such severe gerrymanders are likely to be extremely durable as well, it is unlikely that the disadvantaged party's adherents will be able to protect themselves through

the political process. Where partisan gerrymandering is extreme, the process itself is broken: current legislators have no incentive to alter it, and adherents of the disadvantaged party are unable to do so because their votes have been unfairly diluted.

7. Wisconsin's Current Plan is presumptively unconstitutional under this analysis. In the 2012 election, the Current Plan resulted in an efficiency gap of roughly 13% in favor of Republican candidates. Between 1972 and 2014, fewer than ***four percent*** of all state house plans in the country benefited a party to that extent. In the 2014 election, the efficiency gap remained extremely high at 10%. Between 1972 and 2010, not a ***single*** plan anywhere in the United States had an efficiency gap as high as the Current Plan in the first two elections after redistricting. A district plan this lopsided is also highly unlikely ever to become neutral over its ten-year lifespan. Indeed, we can predict with nearly 100% confidence that, absent this Court's intervention, Wisconsin's Current Plan will continue to unfairly favor Republican voters and candidates—and unfairly disadvantage Democratic voters and candidates—throughout the remainder of the decade.

8. There are three additional facts that reinforce the conclusion that the Current Plan is unconstitutional. First, the Current Plan was not the result of an ordinary political process, where a bill is formulated through a give-and-take between political adversaries and subject to open debate. Instead, it

was drawn up in secret by the Legislature's Republican leadership, without consultation with Democratic leaders or rank-and-file members of either party, with the purpose and intent of altering what was already a favorable map to maximize the Republican Party's partisan advantage. Then the proposal was rammed through the Assembly, without any opportunity for real debate.

9. Second, the Current Plan is also an outlier by another measure of partisan symmetry—partisan bias. Partisan bias is the difference in the share of seats that each party would win if they tied statewide, each receiving 50% of the vote. In 2012, there was a 13% bias in favor of Republicans; in a tied election, Republicans would have won 63% of the Assembly seats, with Democrats winning only 37%. In 2014, there was a 12% bias in favor of Republicans.

10. Third, the Current Plan's extreme partisan skew was entirely unnecessary. Plaintiffs have designed a Demonstration Plan that complies at least as well as the Current Plan with every legal requirement—equal population, the Voting Rights Act, compactness, and respect for political subdivisions—but that is almost perfectly balanced in its partisan consequences. Thus, defendants cannot salvage the Current Plan on the theory that adherence to redistricting criteria or the State's underlying political geography made an unfair plan unavoidable.

11. To be clear, plaintiffs do not seek to replace a pro-Republican gerrymander with a plan that is gerrymandered to be pro-Democratic. Rather, plaintiffs seek as a remedy the creation of a neutral plan that is not gerrymandered to give either side an unfair partisan advantage.

JURISDICTION AND VENUE

12. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 2284. It also has jurisdiction under 28 U.S.C. §§ 2201 and 2202, the Declaratory Judgments Act, to grant the declaratory relief requested.

13. Pursuant to 28 U.S.C. § 2284(a), a three-judge panel should be convened to hear this case.

14. Venue is proper in this judicial district under 28 U.S.C. § 1391(b). At least one of the Defendants resides in the Western District of Wisconsin. In addition, at least six of the plaintiffs reside and vote in this judicial district.

PARTIES

15. Plaintiffs are qualified, registered voters in the State of Wisconsin, who reside in various counties and legislative districts. Plaintiffs are all supporters of the public policies espoused by the Democratic Party and of Democratic Party candidates. Together with other Democratic voters, plaintiffs have been

harmed by the Current Plan's unlawful partisan gerrymandering because it treats Democrats unequally based on their political beliefs and impermissibly burdens their First Amendment right of association. Some of the plaintiffs have been packed into districts with other Democratic voters, while others live in districts that have been cracked by the Current Plan to disadvantage Democratic candidates in close races. Either way, the purpose and effect of the Current Plan is to dilute their voting strength because of their political affiliations.

16. Regardless of where they reside in Wisconsin and whether they themselves reside in a district that has been packed or cracked, all of the plaintiffs have been harmed by the manipulation of district boundaries in the Current Plan to dilute Democratic voting strength. As a result of the statewide partisan gerrymandering, Democrats do not have the same opportunity provided to Republicans to elect representatives of their choice to the Assembly. As a result, the electoral influence of plaintiffs and other Democratic voters statewide has been unfairly, disproportionately, and undemocratically reduced.

17. Plaintiff William Whitford, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 76th Assembly District in Madison in Dane County, Wisconsin.

18. Plaintiff Roger Anclam, a citizen of the United States and of the State of Wisconsin, is a resident and

registered voter in the 31st Assembly District in Beloit in Rock County, Wisconsin.

19. Plaintiff Emily Bunting, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 49th Assembly District in Richland County, Wisconsin.

20. Plaintiff Mary Lynne Donohue, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 26th Assembly District in Sheboygan in Sheboygan County, Wisconsin. In addition to the injury suffered by all Democrats in Wisconsin, Ms. Donohue was harmed when the City of Sheboygan was split into Districts 26 and 27 and District 26 was cracked and converted from a Democratic to a Republican district. See *infra* ¶¶ 63-65.

21. Plaintiff Helen Harris, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 22nd Assembly District in Milwaukee, in Milwaukee County, Wisconsin.

22. Plaintiff Wayne Jensen, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 63rd Assembly District in Rochester, in Racine County, Wisconsin.

23. Plaintiff Wendy Sue Johnson, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 91st Assembly

District in Eau Claire, in Eau Claire County, Wisconsin. In addition to the injury suffered by all Democrats in Wisconsin, Ms. Johnson was harmed when Democratic voters were packed into District 91, wasting their votes and diluting the influence of Ms. Johnson's vote, as part of a gerrymander that reduced the number of Democratic seats in her region. See *infra* ¶¶ 69-71.

24. Plaintiff Janet Mitchell, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 66th Assembly District in Racine, in Racine County, Wisconsin. In addition to the injury suffered by all Democrats in Wisconsin, Ms. Mitchell was harmed when Democratic voters were packed into District 66, wasting their votes and diluting the influence of Ms. Mitchell's vote, as part of a gerrymander that reduced the number of Democratic seats in her region. See *infra* ¶¶ 66-68.

25. Plaintiffs James and Allison Seaton, citizens of the United States and of the State of Wisconsin, are residents and registered voters in the 42nd Assembly District in Lodi, in Columbia County, Wisconsin.

26. Plaintiff Jerome Wallace, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 23rd Assembly District, in Fox Point, in Milwaukee County, Wisconsin. In addition to the injury suffered by all Democrats in Wisconsin, Mr. Wallace was harmed when Democrats in District 22 were cracked so that

his previously Democratic district is now a Republican district. See *infra* ¶¶ 60-62.

27. Plaintiff Don Winter, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 55th Assembly District in Neenah, in Winnebago County, Wisconsin.

28. Defendant Gerald C. Nichol is the Chair of the Wisconsin Government Accountability Board ("G.A.B.") and is named solely in his official capacity as such. The G.A.B. is a state agency under Wis. Stat. § 15.60, which has "general authority" over and "responsibility for the administration of . . . [the State's] laws relating to elections and election campaigns," Wis. Stat. § 5.05(1), including the election every two years of Wisconsin's representatives in the Assembly.

29. Defendants Thomas Barland, John Franke, Harold V. Froehlich, Elsa Lamelas, and Timothy Vocke are all members of the G.A.B. and are named solely in their official capacities as such.

30. Defendant Kevin J. Kennedy is the Director and General Counsel of the G.A.B. and is named solely in his official capacity as such.

BACKGROUND

The Current Plan Was Intended To Discriminate Against Democrats

31. The Current Plan was drafted and enacted with the specific intent to maximize the electoral advantage of Republicans and harm Democrats to the greatest possible extent, by packing and cracking Democratic voters and thus wasting as many Democratic votes as possible. Indeed, after a trial in prior litigation, a three-judge court characterized claims by the Current Plan's drafters that they had not been influenced by partisan factors as "almost laughable" and concluded that "partisan motivation . . . clearly lay behind Act 43." *Baldus v. Wisconsin Government Accountability Board*, 849 F.Supp.2d 840, 851 (E.D. Wis. 2012).

32. The Current Plan was drafted via a secret process run solely by Republicans in the State Assembly and their agents, entirely excluding from participation all Democratic members of the Assembly as well as the public, and preventing public knowledge of and deliberation about the parameters of the Plan.

33. In January 2011, Scott Fitzgerald, Republican member of the Wisconsin State Senate and Wisconsin Senate Majority Leader, and Jeff Fitzgerald, Republican member of the Wisconsin State Assembly and Speaker of the Assembly, hired attorney Eric McLeod ("McLeod") and the law firm of Michael, Best & Friedrich, LLP ("Michael Best"), ostensibly to represent the entire Wisconsin State Senate and Wisconsin State Assembly in connection with the reapportionment of the state legislative districts after

the 2010 Census. In fact, McLeod and Michael Best were retained to assist the Republican leadership in the Legislature in designing a pro-Republican partisan gerrymander.

34. To accomplish this goal, McLeod and Michael Best supervised the work of the legislative aide to the Republican Speaker of the Assembly, Adam Foltz, and the legislative aide to the Republican Majority Leader of the Senate, Tad Ottman, in planning, drafting, negotiating, and gaining the favorable vote commitments of a majority of Republican legislators sufficient to obtain passage of the Current Plan through Wisconsin Act 43.

35. In creating the Current Plan, McLeod, Michael Best, Foltz, and Ottman used past election results to measure the partisanship of the electorate and to design districts, through packing and cracking, that would maximize the number of districts that would elect a Republican and minimize the number of districts that would elect a Democrat. Thus, they intentionally diluted the electoral influence of Democrats, including that of plaintiffs, and discriminated against Democrats, including plaintiffs, because of their political views.

36. McLeod, Michael Best, Foltz, and Ottman were assisted in their work by Dr. Ronald Keith Gaddie, a professor of political science at the University of Oklahoma. Dr. Gaddie created a model that analyzed the expected partisan performance of

all of the districts established by Act 43. Dr. Gaddie's model forecast that the Assembly plan would have a pro-Republican efficiency gap of 12%. When a common methodology is used to ensure an apples-to-apples comparison, this is almost exactly the efficiency gap that the Assembly plan actually exhibited in the 2012 election.

37. Preparation of the Current Plan was done in complete secrecy, excluding Democrats and the public from any part of the process. Indeed, even Republican state legislators were prevented from receiving any information that would allow public discussion or deliberation about the plan. All redistricting work was done in Michael Best's office and the "map room" was located there. A formal written policy provided that only the Senate Majority Leader, the Speaker of the House and their aides Ottman and Foltz, and McLeod and legal staff designated by McLeod would have unlimited access to the map room.

38. The access policy provided for limited access by rank-and-file legislators: "Legislators will be allowed into the office for the sole purpose of looking at and discussing their district. They are only to be present when an All Access member is present. No statewide or regional printouts will be on display while they are present (with the exception of existing districts). They will be asked at each visit to sign an agreement that the meeting they are attending is confidential and they are not to discuss it." But only Republican legislators were allowed even this limited

access. After signing the secrecy agreements contemplated by the policy, Republican legislators were allowed to see only small portions of the map: how their own districts would be affected and details of the partisan performance of voters in their districts in the past, showing that they would be reliable Republican districts.

39. Under the direction and supervision of McLeod, Ottman met with 17 Republican members of the Wisconsin State Senate, identified in Ex. 4 hereto. Each of them signed a secrecy agreement entitled "Confidentiality and Nondisclosure Related to Reapportionment" before being allowed to review and discuss the plan that Michael Best had been hired to develop. The secrecy agreement said that McLeod had "instructed" Ottman to meet with certain members of the Senate to discuss the reapportionment process and characterized such conversations as privileged communications pursuant to the attorney-client and attorney work product privileges—even though the assertion of the privilege was a part of an elaborate "charade" designed "to cover up a process that should have been public from the outset." *Baldus v. Wisconsin Government Accountability Board*, 843 F.Supp.2d 955, 958-61 (E.D. Wis. 2012).

40. Under the direction and supervision of McLeod, Foltz met with 58 Republican members of the Wisconsin State Assembly, identified in Ex. 4 hereto. Each of them signed the same secrecy

agreement entitled "Confidentiality and Nondisclosure Related to Reapportionment" before being allowed to review and discuss the plan that Michael Best had been hired to develop, which also improperly described their conversations as privileged.

41. On July 11, 2011, the plan was introduced by the Committee on Senate Organization without any Democratic members of the Legislature having previously seen their districts or the plan as a whole. As noted above, all Republican members of the Legislature had previously seen their individual districts along with visual aids demonstrating the partisan performance of these districts, but had not seen the overall map.

42. Act 43 was passed in extraordinarily rushed proceedings with little opportunity for input by the public. A public hearing was held on July 13, 2011. The bill was then passed by the Senate on July 19, 2011, and by the Assembly the next day on July 20, 2011. Act 43 was published on August 23, 2011.

43. McLeod and Michael Best were paid $431,000 in State taxpayer funds for their work on the plan, even though they worked solely for Republican leaders of the Legislature and for the benefit of Republicans, and even though they provided no services to Democrats, entirely excluded them from the process, and concealed their work from the public, preventing any public deliberation about the plan.

The Current Plan Has The Effect of Discriminating Against Democrats

The Efficiency Gap Reliably Measures Partisan Gerrymandering

44. The Supreme Court has unanimously agreed that partisan gerrymandering can rise to the level of a constitutional violation. See *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) ("[A]n excessive injection of politics is ***un***lawful") (emphasis added). To date, though, partisan gerrymandering plaintiffs have failed to propose a judicially manageable standard for deciding what constitutes an "excessive" injection of politics into the redistricting process.

45. In the Court's most recent gerrymandering case, *LULAC v. Perry*, 548 U.S. 399 (2006), a majority of the Justices expressed support for a test based on the concept of partisan symmetry. Partisan symmetry is a "require[ment] that the electoral system treat similarly-situated parties equally." *Id.* at 466 (Stevens, J., concurring in part and dissenting in part). In other words, a map is symmetrical when it creates a level playing field, giving neither major party a systematic advantage over its opponent in the conversion of electoral votes into legislative seats.

46. In *LULAC*, the Court considered one particular measure of partisan symmetry, called partisan bias. As described above, partisan bias refers to the divergence in the share of seats that each

party would win given the same share (typically 50%) of the statewide vote. *See id.* at 419-20 (opinion of Kennedy, J.); *id.* at 466 (Stevens, J., concurring in part and dissenting in part).

47. Partisan bias is not the only measure of partisan symmetry. In the last few years, political scientists and legal academics have developed a new symmetry metric, called the efficiency gap, which improves on partisan bias in several respects. *See* Eric M. McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 Legis Stud. Q. 55 (2014); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 101 (2015); Expert Report of Prof. Kenneth R. Mayer (July 3, 2015) ("Mayer Report"), attached hereto as Ex. 2; Expert Report of Prof. Simon D. Jackman (July 7, 2015) ("Jackman Report") attached hereto as Ex. 3.

48. The efficiency gap is rooted in the insight that, in a legal regime in which each district must have an approximately equal population, there are only two ways to implement a partisan gerrymander. First, a party's supporters can be cracked among a large number of districts so that they fall somewhat short of a majority in each one. These voters' preferred candidates then predictably lose each race. Second, a party's backers can be packed into a small number of districts in which they make up enormous majorities. These voters' preferred candidates then prevail by overwhelming margins. All partisan gerrymandering

is accomplished through cracking and packing, which enables the party controlling the map to manipulate vote margins in its favor.

49. Both cracking and packing produce so-called "wasted" votes—that is, votes that do not directly contribute to a candidate's election. When voters are cracked, their votes are wasted because they are cast for losing candidates. Similarly, when voters are packed, their votes are wasted to the extent they exceed the 50%-plus-one threshold required for victory (in a two- candidate race). Partisan gerrymandering also can be understood as the manipulation of wasted votes in favor of the gerrymandering party, so that it wastes fewer votes than its adversary.

50. The efficiency gap is the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast. Suppose, for example, that there are five districts in a plan with 100 voters each. Suppose also that Party A wins three of the districts by a margin of 60 votes to 40, and that Party B wins two of them by a margin of 80 votes to 20. Then Party A wastes 10 votes in each of the three districts it wins and 20 votes in each of the two districts it loses, adding up to 70 wasted votes. Likewise, Party B wastes 30 votes in each of the two districts it wins and 40 votes in each of the three districts it loses, adding up to 180 wasted votes. The difference between the parties' respective wasted

votes is 110, which, when divided by 500 total votes, yields an efficiency gap of 22% in favor of Party A.

51. The efficiency gap is ***not*** based on the principle that parties have a right to proportional representation based on their share of the statewide vote, nor does it measure the deviation from seat-vote proportionality. Instead, by aggregating all of a plan's cracking and packing into a single number, the efficiency gap measures a party's ***undeserved*** seat share: the proportion of seats a party receives that it would ***not*** have received under a balanced plan in which both sides had approximately equal wasted votes. In the above example, for instance, the 22% efficiency gap in favor of Party A means that it won 22% more seats—in this example, 1 more seat out of 5—than it would have under a balanced plan.

52. Over the 1972-2014 period—since the end of the reapportionment revolution of the 1960s— the distribution of state house plans' efficiency gaps has been normal and has had a median of almost exactly zero. *See* Jackman Report at 61; Stephanopoulos & McGhee, *supra*, at 140-42. This indicates that neither party has enjoyed an overall advantage in state legislative redistricting during the modern era.

53. However, recently the average absolute efficiency gap (i.e., the mean of the absolute values of all plans' efficiency gaps in a given year) has increased sharply. This metric stayed roughly constant from 1972 to 2010. But in the current cycle,

fueled by rising partisanship and greater technological sophistication, it spiked to the highest level recorded in the modern era: over 6% for state house plans. *See* Jackman Report at 47; Stephanopoulos & McGhee, *supra*, at 142-45. This means that the severity of today's partisan gerrymandering is historically unprecedented—as is the need for judicial intervention.

Wisconsin's Current Plan Is an Outlier

54. Between 1972 and the present, the efficiency gaps of Wisconsin's Assembly plans became steadily larger and more pro-Republican. The Current Plan represents the culmination of this trend, exhibiting the largest and most pro-Republican efficiency gap ever recorded in modern Wisconsin history. In the 1970s, the Assembly plan had an average efficiency gap close to zero. In both the 1980s and the 1990s, it had an average pro-Republican gap of 2%. The Republican advantage deepened in the 2000s to an average gap of 8%. And it then surged, thanks to the Current Plan, to an average gap of 11% in 2012 and 2014. *See* Jackman Report at 34; Stephanopoulos & McGhee, *supra*, at 154-56.

55. More specifically, using the same methodology as for all other states, the Current Plan produced a pro-Republican efficiency gap of 13% in 2012 and 10% in 2014. The 2012 figure represents the 28th-worst score in modern American history (out of nearly 800 total plans), placing the Current Plan in the worst 4%

of this distribution, more than two standard deviations from the mean. Based on this historical data, there is close to a zero percent chance that the Current Plan's efficiency gap will ever switch signs and favor the Democrats during the remainder of the decade. Furthermore, prior to the current cycle, not a ***single*** plan in the country had efficiency gaps as high as the Current Plan's in the first two elections after redistricting. *See* Jackman Report at 63.

56. Using a more detailed methodology available only for Wisconsin, the Current Plan produced a pro-Republican efficiency gap of 12% in 2012. This is a figure nearly identical to the one calculated using the national data. Using the Wisconsin-specific methodology as well as data compiled prior to 2012 by Dr. Gaddie, the expert retained by the Legislature's Republican leadership to assist them in drafting the Current Plan, that Plan was *forecast* to produce an efficiency gap of 12%. This figure also is nearly identical, and shows that the Current Plan performed precisely as its authors hoped and expected. *See* Mayer Report at 46.

57. This extraordinary level of partisan unfairness was achieved through the rampant cracking and packing of Wisconsin's Democratic voters, which resulted in their votes being disproportionately wasted. The Mayer Report shows that Democratic voters were cracked so that Republican candidates were far more likely to prevail in close races (where the winner had 60% or less of the vote): Republicans

were likely to win 42 such districts, while Democrats would win only 17.[1] Democrats were also packed into a number of districts where they would win overwhelmingly (by getting 80% or more of the vote): there were eight districts where Democrats would win by this margin, compared to zero districts where Republicans would win such a lopsided victory. Thus, through gerrymandering, Republican votes were used more efficiently than Democratic votes to elect representatives, producing an undemocratic result that does not accurately reflect the preferences of the Wisconsin electorate. *See* Mayer Report at 38- 41.

58. The forecasts of Dr. Gaddie, the Republican consultant, prior to the 2012 election confirm that the Current Plan was expected and intended to crack and pack Wisconsin's Democratic voters to this extent. Dr. Gaddie predicted that Republicans would win 46 Assembly districts by a margin smaller than 60%-40%, compared to just 20 such victories for Democrats. He also predicted that Democrats would prevail in seven districts by a margin greater than 80%- 20%, compared to zero such wins for Republicans. *See* Mayer Report at 38-41. These figures are nearly identical to plaintiffs' estimates, and further demonstrate that the Current Plan was

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[1] In making this analysis, the Mayer Report used 2012 election results and further assumed that all districts had been contested and no incumbents had run. These are both standard assumptions made by political scientists to determine a plan's underlying partisanship.

intended to disadvantage Democrats and waste Democratic votes to the maximum extent possible.

Examples of Cracking and Packing in the Current Plan

59. These plan-level statistics are the product of innumerable local cracking and packing decisions. Across Wisconsin, the Current Plan systematically alters prior district configurations to waste larger numbers of Democratic votes and smaller numbers of Republican votes. The following regional examples (depicted in map form in Exhibit 1 hereto) show how the Current Plan deliberately allocates Democratic voters less efficiently and Republican voters more efficiently. These are only illustrative examples; they do not show ***all*** of the ways in which Wisconsin's current pro-Republican gerrymander was achieved. In addition, the examples focus on: (1) the 2012 election because it was the first one held after this cycle's redistricting; (2) the 2008 election because it was the most comparable prior election, featuring a similar share of the statewide Assembly vote for each party (53.9% Democratic in 2008, 51.4% Democratic in 2012) and also coinciding with a presidential election; and (3) Plaintiffs' Demonstration Plan, because it reveals the fair results that could have been, but were not, attained in 2012.

Milwaukee, Ozaukee, Washington, and Waukesha Counties:

60. Under the prior Assembly plan that was in force from 2002-2010 (the "Prior Plan"), District 22 included part of northeastern Milwaukee County; District 23 included part of northern Milwaukee County (home to Plaintiff Wallace) and part of southern Ozaukee County; and District 24 included part of Washington and Waukesha Counties. In the 2008 election, a Democratic candidate won District 22, and Republican candidates won Districts 23 and 24. Under the Demonstration Plan, a Democratic candidate would win District 22, and Republican candidates would win Districts 23 and 24.

61. As a result of the Current Plan, Democratic voters who were in the old District 22 were cracked into the new Districts 23 and 24. Due to these changes, Districts 22, 23, and 24 were won by Republican candidates in 2012.

62. The shift from one Democratic seat and two Republican seats in the Prior Plan and the Demonstration Plan in Milwaukee, Ozaukee, Washington, and Waukesha Counties, to zero Democratic seats and three Republican seats in the Current Plan, contributed to Wisconsin's current pro-Republican efficiency gap. This gerrymandering and its results are shown in the maps attached hereto as Ex. 1.

Calumet, Fond du Lac, Manitowoc and Sheboygan Counties:

63. Under the Prior Plan, District 26 centered on the City of Sheboygan in the central eastern part of Wisconsin (home to Plaintiff Donohue) and District 27 consisted of the northern part of Sheboygan County as well as parts of Fond du Lac, Calumet, and Manitowoc Counties. In the 2008 election, a Democratic candidate won District 26 and a Republican candidate won District 27. Under the Demonstration Plan, a Democratic candidate would win District 26, and a Republican candidate would win District 27.

64. As a result of the Current Plan, Democratic voters who were in District 26 were cracked so that roughly half of that district was distributed to District 27 and additional voters from south of Sheboygan County were added to District 26. Due to these changes, Districts 26 and 27 were won by Republican candidates in 2012.

65. The shift from one Democratic seat and one Republican seat in the Prior Plan and the Demonstration Plan in Sheboygan County and southern Fond du Lac, Manitowoc and Calumet Counties, to zero Democratic seats and two Republican seats in the Current Plan, contributed to Wisconsin's current pro-Republican efficiency gap. This gerrymandering and its results are shown in the maps attached hereto as Ex. 1.

Racine and Kenosha Counties:

66. Under the Prior Plan, Districts 61, 62, 63, 64, 65, and 66 were almost entirely within Racine and Kenosha Counties in the southeastern edge of Wisconsin (the City of Racine is home to Plaintiff Mitchell). Districts 61 and 62 centered on the City of Racine, with District 63 covering the western side of Racine County. Districts 64 and 65 centered on the City of Kenosha, with District 66 covering the western edge of Kenosha County. In the 2008 election, Democratic candidates won Districts 61, 62, 64, and 65, while Republican candidates won Districts 63 and

66. Under the Demonstration Plan, Democratic candidates would win Districts 62, 63, 64, and 66, while Republican candidates would win Districts 61 and 65.

67. As a result of the Current Plan, Democratic voters who were in the old Districts 61 and 62 were packed into the new District 66, thus wasting more Democratic votes in the region. Due to these changes, Districts 64, 65, and 66 were won by Democratic candidates in 2012, while Districts 61, 62, and 63 were won by Republican candidates.

68. The shift from four Democratic seats and two Republican seats in the Prior Plan and the Demonstration Plan in Racine and Kenosha Counties, to three Democratic seats and three Republican seats in the Current Plan, contributed to Wisconsin's current pro-Republican efficiency gap. This

gerrymandering and its results are shown in the maps attached hereto as Ex. 1.

Buffalo, Chippewa, Eau Claire, Jackson, La Crosse, Pepin, Pierce, St. Croix, and Trempealeau Counties:

69. Under the Prior Plan, most of seven Districts (67, 68, 91, 92, 93, 94, and 95) were spread across Buffalo, Chippewa, Eau Claire, Jackson, La Crosse, Pepin, Pierce, St. Croix, and Trempealeau Counties in northwestern Wisconsin (Eau Claire is home to Plaintiff Johnson). In the 2008 election, Democratic candidates won five of the seven Districts (68, 91, 92, 93, and 95), and Republicans won two of them (67 and 94). The district numbers in the Demonstration Plan are slightly different; instead of District 68, District 69 is in Eau Claire County. Under the Demonstration Plan, Democratic candidates would win six of seven Districts (67, 69, 91, 92, 94, and 95) and a Republican candidate would win one of them (93).

70. As a result of the Current Plan, Democratic voters who were in the old District 68 were packed into the new District 91, and Democrats in the rest of old District 68 as well as old Districts 91 and 93 were cracked into the new Districts 68, 92, and 93. Due to these changes, Democratic candidates won only four of the seven districts in 2012 (91, 92, 94, and 95), and Republican candidates won three of them (67, 68, and 93).

71. The shift from five or six Democratic seats, in the Prior Plan and Demonstration Plan respectively, and two or one Republican seats in the Prior Plan and Demonstration Plan respectively, to four Democratic seats and three Republican seats in the Current Plan, in Buffalo, Chippewa, Eau Claire, Jackson, La Crosse, Pepin, Pierce, St. Croix, and Trempealeau Counties, contributed to Wisconsin's current pro-Republican efficiency gap. This gerrymandering and its results are shown in the maps attached hereto as Ex. 1.

Adams, Columbia, Marathon, Marquette, Portage, and Wood Counties:

72. Under the Prior Plan, most of eight Districts (42, 47, 69, 70, 71, 72, 85, and 86) were spread across Adams, Columbia, Marathon, Marquette, Portage, and Wood counties in central Wisconsin (Columbia County is home to Plaintiffs Allison and James Seaton). In the 2008 election, Democratic candidates won five of the eight Districts (42, 70, 71, 72, and 85), and Republicans won three Districts (47, 69, and 86). In the Demonstration Plan the district numbers are different (5, 40, 41, 42, 71, 72, 86, and 87), but of these eight Districts, Democratic candidates would win five (71, 86, 40, 41, and 42), and Republican candidates would win three (5, 72, and 87).

73. As a result of the Current Plan, Democratic voters who were in the old Districts 42, 70, and 72 were cracked, and the new Districts 41, 42, 69, 70, 71, 72, 85, and 86 were created in areas of Adams,

Columbia, Marathon, Marquette, Portage, and Wood Counties. Due to these changes, Democratic candidates won only three of the eight Districts (70, 71, and 85) in 2012, and Republican candidates won five of them (41, 42, 69, 72, and 86).

74. The shift from five Democratic seats and three Republican seats in the Prior Plan and the Demonstration Plan in Adams, Columbia, Marathon, Marquette, Portage, and Wood Counties, to three Democratic seats and five Republican seats in the Current Plan, contributed to Wisconsin's current pro-Republican efficiency gap. This gerrymandering and its results are shown in the maps attached hereto as Ex. 1.

Brown and Manitowoc Counties:

75. Under the Prior Plan, Brown and Manitowoc Counties were split to include parts of Districts 1, 2, 4, 5, 25, 88, 89, and 90 in the Green Bay area of Wisconsin. In the 2008 election, Democratic candidates won Districts 2, 5, 25, and 88, and Republican candidates won Districts 1, 4, 89, and 90. Under the Demonstration Plan, Brown and Manitowoc Counties would include Districts 1, 2, 3, 25, 26, 88, 89, and 90. Under the Demonstration Plan, Democrats would win Districts 2 and 88, and Republicans would win the remaining six districts.

76. As a result of the Current Plan, Democratic voters who were in the old Districts 2, 5 and 25 were

cracked into the new Districts 2, 5, 25, and 88. Due to these changes, seven of the eight districts in the Brown and Manitowoc County area (1, 2, 4, 5, 25, 88, and 89) were won by Republican candidates in 2012, and one District (90) was won by a Democratic candidate in 2012.

77. The shift from four or two Democratic seats in the Prior Plan and the Demonstration Plan, respectively, and four or six Republican seats in the Prior Plan and the Demonstration Plan, respectively, to one Democratic seat and seven Republican seats in the Current Plan, in Brown and Manitowoc Counties, contributed to Wisconsin's current pro- Republican efficiency gap. This gerrymandering and its results are shown in the maps attached hereto as Ex.1.

Wisconsin Does Not Need to Have a Gerrymandered Plan

78. Not only did the Current Plan exhibit extremely large efficiency gaps in 2012 and 2014, but this poor performance was entirely unnecessary and served no legitimate purpose. It would have been possible for Wisconsin to enact an Assembly plan that treated both parties symmetrically and did not disproportionately waste Democratic votes. To prove this point, plaintiffs' expert has designed a Demonstration Plan that would have had an efficiency gap of just ***2%*** in 2012 (assuming all contested districts and no incumbents). *See* Mayer Report at 46. This far better score is attributable to

plaintiffs' efforts ***not*** to crack and pack Democratic voters, and instead to enable both parties to convert their popular support into legislative seats with equal ease.

79. Plaintiffs' Demonstration Plan performs at least as well as the Current Plan on every other relevant metric. Both plans have total population deviations of less than 1%—far below the courts' 10% threshold for presumptive constitutionality. Both plans have six African American opportunity districts and one Hispanic opportunity district, and so are identical for Voting Rights Act purposes. The Demonstration Plan splits one fewer municipal boundary than the Current Plan (119 versus 120), and so is superior in that regard. And the Demonstration Plan's districts are substantially more compact than the Current Plan's (average compactness of 0.41 versus 0.28). *See* Mayer Report at 37.

80. The Demonstration Plan proves that the Current Plan's extreme pro-Republican tilt cannot be blamed on either an effort to comply with legitimate redistricting criteria or Wisconsin's underlying political geography. Both of those factors were perfectly compatible with a neutral map.

COUNT I – FOURTEENTH AMENDMENT VIOLATION

81. Plaintiffs incorporate and re-allege paragraphs 1-80 of this Complaint as paragraphs 1-80 of this Count I.

82. The Current Plan is a partisan gerrymander so extreme that it violates Plaintiffs' Fourteenth Amendment right to equal protection of the laws. The Current Plan intentionally and severely packs and cracks Democratic voters, thus disproportionately wasting their votes, even though a neutral map could have been drawn instead. Accordingly, Wisconsin's Act 43 deprives plaintiffs of their civil rights under color of state law in violation of 42 U.S.C. §§ 1983 and 1988.

83. The efficiency gap provides a workable test to identify unconstitutional partisan gerrymandering similar to the two-part approach applied to state legislative reapportionment claims. In a reapportionment challenge, the first issue is whether a district plan's total population deviation exceeds 10%. If so, the plan is presumptively unconstitutional, and if not, it is presumptively valid. The second issue, which is reached only if the total population deviation is greater than 10%, is whether the malapportionment is necessary to achieve a legitimate state goal. The state bears the burden at this stage of rebutting the presumption of unconstitutionality. *See Voinovich v. Quilter*, 507 U.S. 146, 161-62 (1993); *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983); *Connor v. Finch*, 431 U.S. 407, 418 (1977).

84. The same two-part approach should be applied to partisan gerrymandering claims, only with the efficiency gap substituted for total population deviation. The first step in the analysis is whether a plan's efficiency gap exceeds a certain numerical threshold. If so, the plan is presumptively unconstitutional, and if not, it is presumptively valid. The second step, which is reached only if the efficiency gap is sufficiently large, is whether the plan's severe partisan unfairness is the necessary result of a legitimate state policy, or inevitable given the state's underlying political geography. The state would bear the burden at this stage of rebutting the presumption of unconstitutionality.

85. The Current Plan is plainly unlawful under this two-part test. First, it was forecast to produce, and then ***did*** produce, an efficiency gap of approximately 13% in the 2012 election. This is an extraordinarily high level of partisan unfairness, more than two standard deviations from the mean: as noted above, the 2012 figure represents the 28th-worst score in modern American history (out of nearly 800 total plans), placing the Current Plan in the worst 4% of this distribution. This is also not a temporary or transient gerrymander. The Current Plan's efficiency gap means that there is close to a zero percent chance that the Plan will ever favor Democrats during its lifespan. *See* Jackman Report at 60. Given its severity and predicted durability, the Current Plan's efficiency gap far exceeds any

plausible threshold for presumptive unconstitutionality.

86. Indeed, even a 7% efficiency gap should be presumptively unconstitutional. A 7% efficiency gap is at the edges of the overall distribution of all state house plans in the modern era, making it indicative of uncommonly severe gerrymandering. *See* Jackman Report at 61. Historical analysis shows that with a 7% efficiency gap, the gerrymandering is also likely to be unusually durable—over its lifespan, a plan with an efficiency gap of that magnitude is unlikely ever to favor the opposing party. *See* Jackman Report at 61. However, this Court need not decide at what point an efficiency gap is large enough to trigger a presumption of unconstitutionality. In the state legislative reapportionment context, the applicable cutoff (10%) emerged over a series of cases, in which extreme population deviations (of 34%, then 26%, then 20%) were struck down and deviations of 8% and 10% were upheld before the 10% threshold was adopted. Here too the Current Plan's extreme efficiency gap should be deemed presumptively unconstitutional, without the need to decide what the cut-off should be.

87. Second, the State cannot rebut the presumption that the Current Plan is unlawful. Plaintiffs' Demonstration Plan would have had an efficiency gap of just 2% in 2012 while complying with all federal and state criteria at least as well as the Current Plan. See Mayer Report at 46. Accordingly,

neither an attempt to achieve legitimate redistricting goals nor Wisconsin's underlying political geography could have necessitated the Current Plan's partisan imbalance.

88. In addition to its extreme efficiency gap, the Current Plan exhibits a severe partisan bias. The Current Plan produced a partisan bias of 13% in 2012 and 12% in 2014— scores that in and of themselves demonstrate the unconstitutional effects produced by the Current Plan.

89. Finally, there is no doubt that the Current Plan was specifically intended and indeed designed to benefit Republican candidates, and to disadvantage Democratic candidates, to the greatest possible extent. Thus, the Current Plan had both the purpose and effect of subordinating the adherents of one political party and entrenching a rival party in power, in violation of their right to equal protection under the law.

COUNT II—FIRST AMENDMENT VIOLATION

90. Plaintiffs incorporate and re-allege paragraphs 1-89 of this Complaint as paragraphs 1-89 of this Count II.

91. Plaintiffs and other Democratic voters in the state of Wisconsin have a First Amendment right to freely associate with each other without discrimination by the State based on that association;

to participate in the political process and vote in favor of Democratic candidates without discrimination by the State because of the way they vote; and to express their political views without discrimination by the State because of the expression of those views or the content of their expression.

92. Wisconsin Act 43 violates the First and Fourteenth Amendments because it intentionally uses voters' partisan affiliation to affect the weight of their votes. By taking the actions described above, the drafters of the Current Plan deliberately discriminated against plaintiffs and other Democratic voters because they are Democrats and have voted for and will vote for Democratic candidates and because of the positions they have expressed and will take on public affairs — that is, because of their views and the content of their expression.

93. By excessively and unreasonably cracking and packing groups of Democratic voters to intentionally weaken their voting power, the State of Wisconsin discriminated against Democratic voters, including the plaintiffs, on the basis of their voting choices, their political views, and the content of their expression.

94. The unusual extent of the partisan gerrymandering in this case, as shown by the extremely high efficiency gap and the factors described above, indicates that the gerrymandering in this case is so high that the Current Plan denies to

plaintiffs and other Democratic voters in Wisconsin their rights to free association and freedom of expression guaranteed by the First and Fourteenth Amendments.

95. For these reasons, and because Act 43 and the Current Plan have the purpose and effect of subjecting Democrats to disfavored treatment by reason of their views, Act 43 and the Current Plan are subject to strict scrutiny and cannot be upheld absent a compelling government interest, which is not present in this case.

96. Accordingly, Wisconsin's Act 43 deprives plaintiffs of their civil rights under color of state law in violation of 42 U.S.C. §§ 1983 and 1988.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court:

97. Declare Wisconsin's 99 State Assembly Districts, established by Act 43, unconstitutional and invalid, and the maintenance of these districts for any primary, general, special, or recall election a violation of plaintiffs' constitutional rights;

98. Enjoin Defendants and the G.A.B.'s employees and agents, including the county clerks in each of Wisconsin's 72 counties, from administering, preparing for, and in any way permitting the

nomination or election of members of the State Assembly from the unconstitutional districts that now exist;

99. In the absence of a state law establishing a constitutional district plan for the Assembly districts, adopted by the Legislature and signed by the Governor in a timely fashion, establish a redistricting plan that meets the requirements of the U.S. Constitution and federal statutes and the Wisconsin Constitution and state statutes;

100. Award plaintiffs their reasonable attorneys' fees, costs, and litigation expenses incurred in bringing this action; and

101. Grant such further relief as the Court deems just and proper.

By: /s/ Peter G. Earle
Peter G. Earle
One of the attorneys for plaintiffs

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Preliminary Pre-trial Conference Order

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, *et al.*, Plaintiffs, v. GERALD NICHOL, *et al.*, Defendants.	PRELIMINARY PRETRIAL CONFERENCE ORDER No. 15-cv-421-bbc

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This court held a telephonic preliminary pretrial conference on October 13, 2015. Plaintiffs appeared by Peter Earle and Ruth Greenwood. Defendants appeared by Brian Keenan and Anthony Russomanno. The court set the schedule for this case and advised the parties that their conduct throughout this case is governed by this pretrial conference order and the attachments to it.

The parties and their attorneys must at all times treat everyone involved in this lawsuit with courtesy and consideration. The parties must attend diligently to their obligations in this lawsuit and must reasonably accommodate each other in all matters so as to secure the just, speedy and inexpensive resolution of each proceeding in this matter as

required by Fed. R. Civ. Pro. 1. Failure to do so shall have consequences.

1. Oral Argument on Pending Motion to Dismiss: November 4, 2015 at 1:30 p.m.

Argument shall be to the three-judge panel. Each side will have 30 minutes to present it [sic] arguments.

2. Disclosure of Experts: Plaintiffs: October 23, 2015

Defendants: December 2, 2015

Rebuttal: December 16, 2015

Absent the parties' agreement to a different procedure, all disclosures mandated by this paragraph must comply with the requirements of Rule 26(a)(2). Given the tight calendar in this lawsuit, there shall be no supplementation under Rule 26(e) without leave of court.

3. Deadline for Filing Dispositive Motions: January 4, 2016

All dispositive motions must be accompanied by supporting briefs. All responses to any dispositive motion must be filed and served within 21calendar days of service of the motion. Any reply by the movant must be filed and served within 10 calendar days of

service of the response. Given the tight calendar in this lawsuit, there shall be no extensions of these deadlines.

All parties must follow this court's procedure governing summary judgment motions, a copy of which is attached to this order. The court will not consider any document that does not comply with its summary judgment procedure.

Parties are to undertake discovery in a manner that allows them to make or respond to dispositive motions within the scheduled deadlines. The fact that the general discovery deadline cutoff occurs after the deadlines for filing and briefing dispositive motions is not a ground for requesting an extension of the motion and briefing deadlines.

2. Discovery Cutoff: April 1, 2016

All discovery in this case must be completed not later than the date set forth above, absent written agreement of all parties to some other date. Absent written agreement of the parties or a court order to the contrary, all discovery must conform with the requirements of Rules 26 through 37 and 45. Rule 26(a)(1) governs initial disclosures unless the parties agree in writing to the contrary.

The following discovery materials *shall not* be filed with the court unless they concern a motion or other matter under consideration by the court:

interrogatories; responses to interrogatories; requests for documents; responses to requests for documents; requests for admission; and responses to requests for admission.

A party need not file a deposition transcript with the court until that party is using the deposition in support of some other submission, at which time the entire deposition must be filed. ***Note well:*** as detailed later in this order, any deposition that has not been filed with the court by **May 2, 2016** shall not be used by any party for any purpose at trial. All deposition transcripts must be in compressed format. The court will not accept duplicate transcripts. The parties must determine who will file each transcript.

A party may not file a motion regarding discovery until that party has made a good faith attempt to resolve the dispute. All efforts to resolve the dispute must be set forth in any subsequent discovery motion filed with this court. By this order, the court requires all parties to a discovery dispute to attempt to resolve it quickly and in good faith. Failure to do so could result in cost shifting and sanctions under Rule 37.

This court also expects the parties to file discovery motions promptly if self-help fails. Parties who fail to do so may not seek to change the schedule on the ground that discovery proceeded too slowly to meet the deadlines set in this order.

All discovery-related motions must be accompanied by a supporting brief, affidavit, or other document showing a *prima facie* entitlement to the relief requested. Any response to a discovery motion must be served and filed within seven calendar days of service of the motion. Replies may not be filed unless requested by the court.

4. Final Pretrial Submissions

Not later than **April 25, 2016**, each party shall file and serve all materials specified in Rule 26(a)(3), unless a different procedure is directed below.

Not later than **May 2, 2016**, counsel are to confer for the following purposes:

A. To enter into comprehensive written stipulations of all uncontested facts in such form that they can be offered at trial as the first evidence presented by the party desiring to offer them. If there is a challenge to the admissibility of some uncontested facts that one party wishes included, the party objecting and the grounds for objection must be stated.

B. To make any deletions from their previously-exchanged lists of potential trial witnesses.

C. To enter into written stipulations setting forth the qualifications of expert witnesses.

D. To examine, mark, and list all exhibits that any party intends to offer at trial. (A copy of this court's procedures for marking exhibits is contained in this packet.)

E. To agree as to the authenticity and admissibility of such exhibits so far as possible and note the grounds for objection to any not agreed upon.

F. To agree so far as possible on the contested issues of law.

G. To examine and prepare a list of all depositions and portions of depositions to be read into evidence and agree as to those portions to be read. If any party objects to the admissibility of any portion, the name of the party objecting and the grounds shall be set forth.

It shall be the responsibility of plaintiffs' counsel to convene the conference between counsel and, following that conference, to prepare the Pretrial Statement described in the next paragraph.

Not later than **May 9, 2016**, the parties jointly shall submit a Pretrial Statement containing the following:

A. The parties' comprehensive written stipulations of all uncontested facts.

B. An updated prediction on the probable length of the trial.

C. The names of all prospective witnesses. Only witnesses so listed will be permitted to testify at the trial except for good cause shown.

D. The parties' written stipulation setting forth the qualifications of all expert witnesses.

E. Schedules of all exhibits that will be offered in evidence at the trial, together with an indication of those agreed to be admissible and a summary statement of the grounds for objection to any not agreed upon. Only exhibits so listed shall be offered in evidence at the trial except for good cause shown.

F. An agreed statement of the contested issues of law supplemented by a separate statement by each counsel of those issues of law not agreed to by all parties.

G. A list of all depositions and portions of depositions to be offered in evidence, together with an indication of those agreed to be admissible and summary statements of the grounds for objections to any not so agreed upon. If only portions of a deposition are to be offered, counsel should mark the deposition itself with colored markers identifying the portions each party will rely upon.

H. Complete copies of all deposition transcripts to be used at trial, in compressed format.

Not later than **May 9, 2016**, counsel for each side shall file and serve a statement of all the facts that counsel will request the court to find at the conclusion of the trial. In preparing these statements, counsel should have in mind those findings that will support a judgment in their client's favor. The proposed findings should be complete. They should be organized in the manner in which counsel wish them to be entered. They should include stipulated facts, as well as facts not stipulated to but which counsel expect to be supported by the record at the conclusion of the trial. Those facts that are stipulated shall be so marked.

Along with these proposed findings of fact, counsel for each side shall file and serve a proposed form of special verdict, as if the case were to be tried to a jury.

Not later than **May 16, 2016**, counsel for each side shall file and serve:

A. Five complete sets of counsel's pre-marked trial exhibits to be used by the judges, the court clerk and the court reporter as working copies at trial.

B. A trial brief.

Final pretrial submissions are to be filed as stated above with no exceptions.

4. Bench Trial: May 23, 2016 at 9:00 a.m.

Trial shall be to a three-judge panel. The parties currently estimate that this case will take eight days to try.

This case will be tried in an electronically equipped courtroom and the parties shall present their evidence using this equipment. Counsel are responsible for timely ensuring the compatibility of any of their personal equipment with the court's system.

Entered this 15th day of October, 2015.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

* * *

Opinion and Order Denying Defendants' Motion to Dismiss

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, ROGER ANCLAM, EMILY BUNTING, MARY LYNNE DONOHUE, HELEN HARRIS, WAYNE JENSEN, WENDY SUE JOHNSON, JANET MITCHELL, ALLISON SEATON, JAMES SEATON, JEROME WALLACE and DONALD WINTER,

Plaintiffs,

v.

GERALD C. NICHOL, THOMAS BARLAND, JOHN FRANKE, HAROLD V. FROEHLICH, KEVIN J. KENNEDY, ELSA LAMELAS and TIMOTHY VOCKE,

Defendants.

OPINION AND ORDER

15-cv-421-bbc

In this civil action brought under 42 U.S.C. § 1983, plaintiffs are Wisconsin residents and Democratic voters who are challenging the 2012 districting plan for the Wisconsin Assembly on the ground that the plan is an example of "extreme partisan gerrymandering." Cpt. ¶ 2, dkt. #1. Plaintiffs contend that the plan violates the First and Fourteenth Amendments to the United States Constitution because the plan "treats voters unequally, diluting their voting power based on their political beliefs, in violation of the Fourteenth Amendment's guarantee of equal protection" and "unreasonably burdens their First Amendment rights of association and free speech." Id.

Defendants have filed a motion to dismiss, dkt. #24, which is ready for review. Although we believe that plaintiffs face significant challenges in prevailing on their claims, we conclude that plaintiffs' complaint is sufficient to state a claim upon which relief may be granted. Accordingly, we are denying defendants' motion to dismiss.

In their complaint, plaintiffs allege the following facts.

ALLEGATIONS OF FACT

A. Parties

Plaintiffs William Whitford, Roger Anclam, Emily Bunting, Mary Lynne Donohue, Helen Harris, Wayne

Jensen, Wendy Sue Johnson, Janet Mitchell, James Seaton, Allison Seaton, Jerome Wallace and Don Winter are United States citizens registered to vote in Wisconsin. They reside in various counties and legislative districts throughout the state. All of them are "supporters of the public policies espoused by the Democratic Party and of Democratic Party candidates." Cpt. ¶ 15, dkt. #1.

Defendant Gerald C. Nichol is the chair of the Wisconsin Government Accountability Board, which is responsible for the administration of Wisconsin's laws relating to elections and election campaigns. Defendants Thomas Barland, John Franke, Harold V. Froehlich, Elsa Lamelas and Timothy Vocke are all members of the board. Defendant Kevin J. Kennedy is the director and general counsel for the board.

B. Passage of Wisconsin Act 43

In January 2011, Scott Fitzgerald, Republican member of the Wisconsin State Senate and Senate Majority Leader, and Jeff Fitzgerald, Republican member of the Wisconsin State Assembly and Speaker of the Assembly, hired lawyer Eric McLeod and the law firm of Michael, Best & Friedrich, LLP, to assist with the reapportionment of the state legislative districts after the 2010 Census. The intent of the speaker and majority leader was to design a pro-Republican partisan gerrymander. To accomplish this goal, the firm supervised the work of legislative aides in planning, drafting and negotiating Wisconsin

Act 43, which contains the 2012 Assembly districting plan.

The law firm and the aides used past election results to measure the partisanship of the electorate and to design districts that would maximize the number of districts that would elect a Republican and minimize the number of districts that would elect a Democrat. This would be accomplished in two ways, by "cracking" or "packing." Cracking means dividing a party's supporters among multiple districts so that they fall short of a majority in each one. Packing means concentrating one party's backers in a few districts that they win by overwhelming margins. Both cracking and packing result in "wasted" votes, that is, votes cast either for a losing candidate (in the case of cracking) or for a winning candidate but in excess of what he or she needed to prevail (in the case of packing).

The firm and the aides received assistance from Dr. Ronald Keith Gaddie, a professor of political science at the University of Oklahoma. Gaddie created a model that analyzed the expected partisan performance of all of the districts established by Act 43. Gaddie's model forecast that the Assembly plan would have a pro-Republican "efficiency gap" of 12 percent. The efficiency gap is the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast.

All redistricting work was done in the firm's office. Only the speaker, the majority leader, their aides, McLeod and legal staff designated by McLeod would have unlimited access to the plan while it was prepared. The access policy provided for limited access by other Republican legislators:

> Legislators will be allowed into the office for the sole purpose of looking at and discussing their district. They are only to be present when an All Access member is present. No statewide or regional printouts will be on display while they are present (with the exception of existing districts). They will be asked at each visit to sign an agreement that the meeting they are attending is confidential and they are not to discuss it.

Cpt. ¶ 38, dkt. #1. Democratic legislators were not granted any access to the office. They had no involvement in drafting the plan.

After signing the secrecy agreements contemplated by the policy, Republican legislators were allowed to see only small portions of the map. This included information regarding how their own districts would be affected. Under the direction and supervision of McLeod, the aides met with Republican members of both houses. Each of the members signed a secrecy agreement entitled "Confidentiality and Nondisclosure Related to Reapportionment" before being allowed to review and discuss the plan.

On July 11, 2011, the plan was introduced by the Committee on Senate Organization. At that time, no Democratic members of the legislature had seen their districts or the plan as a whole.

On July 13, 2011, a public hearing was held. On July 19, 2011, the Senate passed the bill; on July 20, 2011, the Assembly passed it. On August 23, 2011, Act 43 was published.

The firm received $431,000 from public funds for their work on the plan.

C. Comparison of Wisconsin Act 43 to Other Plans

From 1972 to 2014, the median efficiency gap for state house plans across the country was close to zero. This indicates that neither party has enjoyed an overall advantage in state legislative redistricting during the modern era. However, recently the average absolute efficiency gap, that is, the mean of the absolute values of all plans' efficiency gaps in a given year, has increased sharply. This metric stayed roughly constant from 1972 to 2010, but in the current cycle, it spiked to the highest level recorded in the modern era, more than 6 percent for state house plans.

Between 1972 and the present, the efficiency gaps of Wisconsin's Assembly plans became steadily larger and more pro-Republican. The current plan represents the culmination of this trend, exhibiting

the largest and most pro-Republican efficiency gap ever recorded in modern Wisconsin history. In the 1970s, the Assembly plan had an average efficiency gap close to zero. In both the 1980s and the 1990s, it had an average pro-Republican gap of 2 percent. The Republican advantage deepened in the 2000s to an average gap of 8 percent. Under the current plan, the average gap is 11 percent.

A 7 percent efficiency gap is at the edges of the overall distribution of all state house plans in the modern era, making it indicative of uncommonly severe gerrymandering. Historical analysis shows that with a 7 percent efficiency gap, the gerrymandering is also likely to be unusually durable. Over its lifespan, a plan with an efficiency gap of that magnitude is unlikely ever to favor the opposing party.

In 2012, the current plan produced a pro-Republican efficiency gap of 13 percent. In 2014, it was 10 percent. The 2012 figure represents the 28th largest score in modern American history (out of nearly 800 total plans), placing the current plan in the most partisan 4 percent of this distribution, more than two standard deviations from the mean. This historical data suggests that there is close to a zero percent chance that the current plan's efficiency gap will ever favor the Democrats during the remainder of the decade. Prior to the current cycle, not a single plan in the country had efficiency gaps as high as the

current plan's in the first two elections after redistricting.

Using a more detailed methodology available only for Wisconsin, the current plan produced a pro-Republican efficiency gap of 12 percent in 2012. This is a figure nearly identical to the one calculated using the national data. It is also the same efficiency gap predicted by Dr. Gaddie when the plan was being drafted.

Under the current plan, Republican candidates have been far more likely to prevail in close races. In addition, there were eight districts in which Democrats won with more than 80 percent of the vote. There were no districts in which Republicans won by such a wide margin. Across Wisconsin, the current plan systematically alters prior district configurations to waste larger numbers of Democratic votes and smaller numbers of Republican votes.

D. Possible Alternatives to Wisconsin Act 43

It would have been possible for Wisconsin to enact an Assembly plan that treated both parties symmetrically. Under a plan prepared by plaintiffs, the efficiency gap would have been 2 percent in 2012 (assuming that races were contested and that no races included an incumbent). This score is attributable to plaintiffs' efforts not to crack and pack Democratic voters and instead to enable both parties to convert

their popular support into legislative seats with equal ease.

Plaintiffs' plan performs at least as well as the current plan on every other metric used by courts to evaluate the validity of a districting plan. Both plans have total population deviations of less than 1 percent. Both plans have six African American opportunity districts and one Hispanic opportunity district. Plaintiffs' plan splits one fewer municipal boundary than the current plan. The districts in plaintiffs' plan are substantially more compact than the current plan (average compactness of 0.41 versus 0.28).

OPINION

A. Standard of Review

To satisfy federal pleading standards, a plaintiff need only draft a complaint that provides the defendants adequate notice and "state[s] a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "Plausible" does not mean "probable." Iqbal, 556 U.S. at 678. See also Alexander v. United States, 721 F.3d 418, 422 (7th Cir. 2013) ("[I]t is not . . . necessary (or appropriate) to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences.") (internal quotations omitted). Rather,

"plausible" means that the plaintiffs' allegations are sufficient to raise a right to relief above the speculative level. Twombly, 550 U.S. at 555. The same standard applies to both the merits and jurisdiction. Silha v. Act, Inc., No. 15-1083, — F.3d. —, 2015 WL 7281602, at *4 (7th Cir. Nov. 18, 2015) ("When evaluating a facial challenge to subject matter jurisdiction under Rule 12(b)(1), a court should use Twombly–Iqbal's 'plausibility' requirement."). We must accept all well-pleaded factual allegations as true and view them in the light most favorable to the plaintiffs. Luevano v. Wal–Mart Stores, Inc., 722 F.3d 1014, 1027 (7th Cir. 2013).

B. Political Question Doctrine

In their opening brief, defendants ask this court to grant their motion to dismiss on the ground that plaintiffs' claims are not justiciable, or, more specifically, that partisan gerrymandering claims raise political questions that only other branches of government can resolve because the claims lack a judicially manageable standard. Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (2012) ("[A] controversy involves a political question where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.") (internal quotations and alterations omitted). We decline this request because defendants' position has not been adopted by a majority of the justices on the Supreme

Court. In Davis v. Bandemer, 478 U.S. 109, 123 (1986), the Court rejected the argument that partisan gerrymandering claims are nonjusticiable political questions. In Vieth v. Jubelirer, 541 U.S. 267, 305 (2004), four justices expressed the view that partisan gerrymandering is a political question, but the other five justices rejected that view. In League of United Latin American Citizens v. Perry, 548 U.S. 399, 420 (2006), the Court declined to revisit the issue. Since LULAC, the Court has not considered the merits of a partisan gerrymandering claim, so we conclude that Bandemer still controls on the narrow question whether partisan gerrymandering claims are barred under the political question doctrine. See also Shapiro v. McManus, No. 14-990, — U.S. — 2015 WL 8074453, at *5 (U.S. Dec. 8, 2015) (acknowledging that a majority of the Court has declined to find partisan gerrymandering claims nonjusticiable). Until a majority of the Supreme Court rules otherwise, lower courts must continue to search for a judicially manageable standard.

C. Standing

In an order dated November 17, 2015, dkt. #38, we asked the parties to submit supplemental briefs on the threshold question whether plaintiffs have standing to sue under the test articulated in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), which requires the plaintiffs to show that they have suffered a concrete and particularized injury that is fairly traceable to the defendants' conduct and that is likely

to be redressed by winning the lawsuit. In particular, we asked the parties to discuss whether a voter has a legal interest in the election results outside his or her own district. Having reviewed the parties' submissions, we are persuaded that plaintiffs have met their burden at the pleading stage to allege that they have standing.

In their supplemental briefs, plaintiffs say that their injury is set forth in paragraph 16 of their complaint:

> Regardless of where they reside in Wisconsin and whether they themselves reside in a district that have been cracked or packed, all of the plaintiffs have been harmed by the manipulation of district boundaries in the Current Plan to dilute Democratic voting strength. As a result of the statewide partisan gerrymandering, Democrats do not have the same opportunity provided to Republicans to elect representatives of their choice to the Assembly. As a result, the electoral influence of plaintiffs and other Democratic voters statewide has been unfairly, disproportionately, and undemocratically reduced

In other words, we understand plaintiffs to identify their injury as not simply their inability to elect a representative in their own districts, but also their reduced opportunity to be represented by Democratic

legislators across the state. Plts.' Supp. Br., dkt. #41, at 5 ("The Current Plan's enormous (and intentional) pro-Republican efficiency gap injures all Democrats in Wisconsin by diluting the collective value of their individual votes on a statewide basis.").

In arguing that plaintiffs do not have standing to bring a statewide challenge, defendants point to Justice Stevens' dissent in Vieth, 541 U.S. at 327-28, in which he suggested that a plaintiff's standing in a political gerrymandering case should be governed by the same standard as a racial gerrymandering case under the equal protection clause, which generally limits a plaintiff's standing to the district in which he or she lives. Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1265 ("[A] voter who lives elsewhere in the State . . . normally lacks standing to pursue a racial gerrymandering claim."). Because plaintiffs have not joined a Democrat from each of the 99 Assembly districts, defendants argue that plaintiffs lack standing to bring a statewide challenge. Lower courts and commentators have also raised questions about whether the type of injury plaintiff allege is sufficiently concrete and particularized to confer standing. E.g., Radogno v. Illinois State Bd. of Elections, No. 1:11-CV-04884, 2011 WL 5025251, at *4 (N.D. Ill. Oct. 21, 2011) ("The standing analysis for political gerrymandering claims is complicated by the largely unresolved status of political gerrymandering claims in general. That is, even if such claims are theoretically viable . . . it is not particularly clear who would have standing to

bring them."); Heather K. Gerken, Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum, 153 U. Pa. L. Rev. 503, 509 n.31 (2004) (noting "the difficulty that those endorsing a purely individualist approach to the partisan gerrymander would encounter in describing the injury in sufficiently concrete terms to confer standing").

Although the answer is not free from doubt, we conclude that plaintiffs' alleged injury is sufficiently concrete and particularized under current law to satisfy Lujan with respect to a statewide challenge to the districting plan, even without a plaintiff from every legislative district. In each of the three cases in which the Supreme Court considered partisan gerrymandering claims, the plaintiffs were challenging the plan statewide, yet only one justice (Justice Stevens) questioned the plaintiffs' standing. LULAC, 548 U.S. at 419-20 (opinion of Kennedy, J.) (discussing statewide scope of plaintiffs' partisan gerrymandering claims); Vieth, 541 U.S. at 285 (plurality opinion) ("[A]ppellants propose a test that is satisfied only when partisan advantage was the predominant motivation behind the entire statewide plan.") (internal quotations omitted); Bandemer, 478 U.S. at 127 ("[T]he claim made by the appellees in this case is a claim that the 1981 apportionment discriminates against Democrats on a statewide basis."). Arguably, Justice O'Connor raised a similar concern in Bandemer, although she treated the issue as one related to the merits rather than standing.

Bandemer, 478 U.S. at 153 ("To treat the loss of candidates nominated by the party of a voter's choice as a harm to the individual voter, when that voter cannot vote for such candidates and is not represented by them in any direct sense, clearly exceeds the limits of the Equal Protection Clause.").

As we noted in the November 17 order, the Supreme Court's failure to address standing in Bandemer, Vieth and LULAC is not dispositive because "assumptions—even on jurisdictional issues—are not binding." Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 478–79 (2006). However, it seems telling that the Supreme Court has not rested its determinations on this threshold issue. Even in Vieth, in which the district court found expressly that the plaintiffs had standing to raise a statewide claim, Vieth v. Pennsylvania, 188 F. Supp. 2d 532, 539-40 (M.D. Pa. 2002), and Justice Stevens raised standing concerns, the other justices did not think it necessary to consider the issue, even though dismissing the case for lack of standing would have involved a more straightforward analysis than a discussion of the political question doctrine or the merits. Again, when the Court decided LULAC two years later, only Justice Stevens discussed standing.

In other cases, the Supreme Court has recognized injuries similar to those alleged by plaintiffs in this case. For example, in cases challenging the drawing of legislative districts under Section 2 of the Voting Rights Act, the harm may include the dilution of a

racial minority's political power through "cracking" and "packing" that minority in order to minimize the number of districts in which that minority may elect the candidate of its choice. E.g., Johnson v. De Grandy, 512 U.S. 997, 107 (1994) ("[M]anipulation of district lines can dilute the voting strength of politically cohesive minority group members, whether by fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them, or by packing them into one or a small number of districts to minimize their influence in the districts next door."). See also LULAC, 548 U.S. at 496 (Roberts, C.J., concurring in part, concurring in the judgment and dissenting in part) ("[A] § 2 plaintiff must at least show an apportionment that is likely to perform better for minority voters, compared to the existing one."). Under Section 2, the scope of the claim is tied to the scope of the injury, so standing to sue is limited to "[p]laintiffs [who] reside in a reasonably compact area that could support additional" majority-minority districts. Pope v. Cty. of Albany, No. 1:11-CV-0736 LEK/CFH, 2014 WL 316703, at *5-6 (N.D.N.Y. Jan. 28, 2014) (citing Johnson, 512 U.S. at 1013-15).

Because plaintiffs' alleged injury in this case relates to their statewide representation, it follows that they should be permitted to bring a statewide claim. As plaintiffs point out, the Supreme Court has found that individual plaintiffs have standing to bring challenges to the entire state's districting map in "one-person, one-vote" cases, in which the plaintiffs

allege that population differences among legislative districts violate the equal protection clause. Baker v. Carr, 369 U.S. 186, 204-08 (1962). At this stage, this is further support for a more general view that plaintiffs challenging legislative districts have standing to challenge the entire state plan when the nature of the injury is statewide. Defendants say that Baker is only about the dilution of an individual vote, but that is not necessarily true. Bandemer, 478 U.S. at 166-67 ("While population disparities do dilute the weight of individual votes, their discriminatory effect is felt only when those individual votes are combined.") (emphasis added) (opinion of Powell, J.).

We acknowledge that the Supreme Court's limited discussion of standing in the context of gerrymandering claims leaves some questions unanswered.E.g., Richard H. Fallon, Jr., The Fragmentation of Standing, 93 Tex. L. Rev. 1061, 1117 (2015) (stating that injury recognized in "one-person, one-vote" cases does "not fit comfortably within the conceptual bounds" of Lujan framework); Timothy G. O'Rourk, Shaw v. Reno: The Shape of Things to Come, 26 Rutgers L.J. 723, 773 (1995) (questioning whether standing in "one- person, one-vote" cases should be treated differently from racial gerrymandering cases). Although it may be that ultimately the Supreme Court decides to limit standing in all gerrymandering cases the same way it has limited racial gerrymandering claims under the equal protection clause, we believe that, under

current law, plaintiffs have adequately alleged an injury in fact.

We reach the same conclusion with respect to the second and third elements of standing, which are causation and redressability. Plaintiffs have alleged that defendants' districting plan has denied them a fair chance to elect representatives across the state and that adopting a new plan that complies with their theory of partisan symmetry would make it easier for them to gain representation. At this stage of the proceedings, we must accept those allegations as true.

Our conclusion that plaintiffs have adequately alleged standing is supported by defendants' failure to cite any cases in which a court found in a partisan gerrymandering case that the plaintiffs did not have standing to bring a statewide challenge. Although the cases plaintiffs cite contain little discussion of standing, we are hesitant to dismiss a case for lack of standing based solely on the pleadings when other courts considering partisan gerrymandering consistently have assumed that standing exists to challenge a statewide plan. E.g., Perez v. Perry, 26 F. Supp. 3d 612 (W.D. Tex. 2014); Baldus v. Members of Wisconsin Government Accountability Board, 849 F. Supp. 2d 840 (E.D. Wis. 2012); Committee for a Fair and Balanced Map v. Illinois State Board of Elections, 835 F. Supp. 2d 563 (N.D. Ill. 2011); Fletcher v. Lamone, 831 F. Supp. 2d 887, 903-04 (D. Md. 2011); Perez v. Texas, 2011 WL 9160142. at *9 (W.D. Tex. 2011); Radogno v. Illinois State B of Elections, 2011

WL 5868225 (N.D. Ill. 2011); Radogno v. Illinois State Board of Elections, 2011 WL 5025251, at *4 (N.D. Ill. 2011).

Accordingly, we are denying defendants' motion to dismiss for lack of standing. However, defendants are free to raise this issue again on a more developed record in the context of a motion for summary judgment.

D. Merits

With respect to the merits, the parties focus on plaintiffs' equal protection claim, so we will do the same. (The parties debate whether defendants' motion seeks dismissal of plaintiffs' First Amendment claim, but we need not resolve that issue because neither side identifies an analytical difference between the two claims.) Generally, an equal protection claim requires a showing of a discriminatory intent and a discriminatory effect. Bandemer, 478 U.S. at 127 (plurality opinion) (citing City of Mobile, Alabama v. Bolden, 446 U.S. 55, 67-68 (1980)). However, because the Supreme Court has stated that some amount of partisan bias is inevitable in redistricting, e.g., id. at 129 (plurality opinion), the challenge in partisan gerrymandering claims has been in determining "how much is too much" and in choosing the appropriate standard for making that determination. Vieth, 541 U.S. at 298-99 (plurality opinion); id. at 344 (Souter, J., dissenting). Thus far, the Supreme Court has not identified a standard for

reviewing a partisan gerrymandering claim, but it has left open the possibility that an appropriate standard may be found. Vieth, 541 U.S. at 306 (Kennedy, J., concurring in the judgment) ("I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.").

Plaintiffs set forth a three-part test for establishing a constitutional violation. In step one, the plaintiffs must show that the defendants intended to discriminate against an "identifiable political group" of which the plaintiffs are a member. Plts.' Br., dkt. #31, at 9 (quoting Bandemer, 478 U.S. at 127 (plurality opinion)). In step two, the plaintiffs must show a discriminatory effect through a metric called the "efficiency gap," which is discussed more below. If the plaintiffs make the first two showings, the burden shifts to the defendants in step three to show that the efficiency gap was "the necessary result of either a legitimate state policy or the state's underlying political geography." Id. at 10. Plaintiffs say that they modeled steps two and three after the standard for "one-person, one-vote" gerrymandering cases, under which the state must show that population deviations over ten percent are justified by a legitimate state interest. E.g., Brown v. Thomson, 462 U.S. 835, 842-43 (1983).

With respect to the first element, plaintiffs point to their allegations that Republican state legislators

hired lawyers and an expert for the purpose of redrawing all district lines to maximize Republican victories and minimize wins for Democratic candidates. Cpt. ¶¶ 8, 31, 33-36, dkt. #1. The plan was drafted in secret and without any input from Democrats. Id. at ¶¶ 8, 31-32, 37-40. Defendants do not challenge this part of plaintiffs' standard and they do not deny that plaintiffs have adequately alleged discriminatory intent against an identifiable political group (Democratic voters).

The parties focus on whether plaintiffs have adequately pleaded a discriminatory effect and, more generally, whether plaintiffs have identified a judicially discernible and manageable standard for making a showing of discriminatory effect. Plaintiffs' theory of equal representation comes from a concept called "partisan symmetry," which plaintiffs define as "the idea that a district plan should treat the major parties symmetrically with respect to the conversion of votes to seats and that neither party should have a systematic advantage in how efficiently its popular support translates into legislative power." Cpt. ¶ 4, dkt. #1. See also LULAC, 548 U.S. at 466-67 (Stevens, J., concurring in part and dissenting in part) ("The symmetry standard requires that the electoral system treat similarly-situated parties equally.").

Plaintiffs measure partisan symmetry through what they call the "efficiency gap," which plaintiffs describe as follows:

> [t]he efficiency gap captures in a single number all of a district plan's cracking and packing—the two fundamental ways in which partisan gerrymanders are constructed. Cracking means dividing a party's supporters among multiple districts so that they fall short of a majority in each one. Packing means concentrating one party's backers in a few districts that they win by overwhelming margins. Both cracking and packing result in "wasted" votes: votes cast either for a losing candidate (in the case of cracking) or for a winning candidate but in excess of what he or she needed to prevail (in the case of packing). The efficiency gap is the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast.

Cpt. ¶ 5, dkt. #1. Plaintiffs provide an example to demonstrate how the efficiency gap is calculated:

> Suppose, for example, that there are five districts in a plan with 100 voters each. Suppose also that Party A wins three of the districts by a margin of 60 votes to 40, and that Party B wins two of them by a margin of 80 votes to 20. Then Party A wastes 10 votes in each of the three districts it wins and 20 votes in each of the two districts it loses, adding up to 70 wasted votes. Likewise, Party B wastes 30 votes in each of the two districts it wins and 40 votes in each of the three districts it loses,

> adding up to 180 wasted votes. The difference between the parties' respective wasted votes is 110, which, when divided by 500 total votes, yields an efficiency gap of 22% in favor of Party A.

Id. at ¶ 50. (Another measure of partisan symmetry is "partisan bias," which plaintiffs define as "the difference between the shares of seats that the parties would win if they each received the same share of the statewide vote." Plts.' Br., dkt. #31, at 9. Although plaintiffs allege that the 2012 Assembly plan demonstrates a high level of partisan bias, the parties focus on the efficiency gap, so we will do the same.)

According to plaintiffs, the efficiency gap accurately measures discriminatory effect because it shows the extent to which a "party . . . enjoy[s] a significant advantage in how efficiently its votes convert into seats." Plts.' Br., dkt. #31, at 18. Plaintiffs say that such an advantage violates "every voter['s]constitutional right to equal treatment in the electoral system—and the right not to be treated differently based on the voter's political beliefs." Id. Thus, plaintiffs argue, if they can show that the defendants acted with partisan intent and that the efficiency gap exceeds a "reasonable threshold," then the plan is presumptively unconstitutional. Plts.' Br., dkt. #31, at 9. In determining the threshold, the court looks at the efficiency gap from other elections over time and across the country. Id. at 4. Plaintiffs contend that a gap of more than 7 percent is a strong

indicator that the bias in favor of a particular party is likely to endure for the life of the districting plan. Id.

Plaintiffs assert that the 2012 Assembly Plan meets their test because the efficiency gap for the 2012 election was 12 percent and the efficiency gap for the 2014 election was 10 percent, both of which are greater than the threshold. In their motion, defendants do not challenge the sufficiency of plaintiffs' allegations that a district plan with an efficiency gap as high as Wisconsin's Assembly plan is "highly unlikely ever to become neutral over its ten-year lifespan" or that plaintiffs "can predict with nearly 100% confidence that . . . Wisconsin's Current Plan will continue to unfairly favor Republican voters and candidates—and unfairly disadvantage Democratic voters and candidates—throughout the remainder of the decade." Cpt. ¶ 7, dkt. #1. In addition, defendants do not challenge the sufficiency of plaintiffs' allegations that the Assembly plan's efficiency gap cannot be justified by traditional districting criteria or any other legitimate factor.

Defendants' primary argument is that partisan symmetry is no different from the theories that the Supreme Court has rejected in the past. In particular, defendants say that partisan symmetry is simply a form of proportional representation, which the Supreme Court has said repeatedly is not required by the Constitution. E.g., Bandemer, 478 U.S. at 129-30 (plurality opinion) ("Our cases, however, clearly foreclose any claim that the Constitution requires

proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.").

Plaintiffs argue that the efficiency gap is about comparing the wasted votes of each party, not determining whether the party's percentage of the statewide vote share is reflected in the number of representatives that party elects successfully. At this stage, we must accept as true the allegation that an election's results may have a small efficiency gap without being proportional or they may be proportional and still have a large efficiency gap. Plts.' Br., dkt. #31, at 24 (citing Nicholas O. Stephanopoulos & Eric M. McGhee, Partisan Gerrymandering and the Efficiency Gap, 82 U. Chi. L. Rev. 831, 854 & n.118 (2015)).[1] Further, the plaintiffs

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[1]Plaintiffs provide the following example in their brief:

> [A]ssume that a state has ten districts, each with a hundred voters, and two parties, Party A and Party B. Assume also that Party A wins two districts by a margin of 80 to 20 and four districts by a margin of 70 to 30, and that Party B wins four districts by a margin of 60 to 40. Then there is perfectly proportional representation; Party A receives 600 of the 1000 votes in the state ((2 x 80) + (4 x 70) + (4 x 40)) and wins six of the ten seats. But the efficiency gap here is not zero. It is actually 10%, the difference between Party A's 300 wasted votes ((2 x 30) + (4 x 20) + (4 x 40))

in Bandemer, Vieth and LULAC did not rely on partisan symmetry in their arguments before the Court and the Court did not reject partisan symmetry as a tool in determining whether partisan gerrymandering is unconstitutional. LULAC, 548 U.S. at 417 (opinion of Kennedy, J.) (rejecting standard requiring plaintiffs to show "single-minded purpose . . . to gain partisan advantage"); Vieth, 541 U.S. at 284-87 (plurality opinion) (rejecting standard requiring plaintiffs to show "predominant intent to achieve partisan advantage," "systematically 'pack[ing]' and 'crack[ing]' the rival party's voters" and "thwart[ing] plaintiffs' ability to translate a majority of votes into a majority of seats"); Bandemer, 478 U.S. at 129-30 (rejecting proportional representation requirement).

In fact, some of the justices have pointed to partisan symmetry as a theory with promise. LULAC, 548 U.S. at 465-66 (Stevens, J., concurring in part and dissenting in part) ("[T]he symmetry standard, a measure social scientists use to assess partisan bias . . . is undoubtedly a reliable standard for measuring a burden on the complainants'

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and Party B's 200 wasted votes ((2 x 20) + (4 x 30) + (4 x 10)), divided by the 1000 total votes cast.

Plts.' Br., dkt. #31, at 24. See also Stephanopoulos & McGhee, supra, 82 U. Chi. L. Rev. at 854 n.118 ("According to the efficiency gap equation, . . . [i]f a party receives 60 percent of the vote and 60 percent of the seats, for example, a plan would have an efficiency gap of 10 percent against the party.").

representative rights.") (internal quotations and alterations omitted); id. at 483-84 (Souter, J., concurring in part and dissenting in part) ("[N]or do I rule out the utility of a criterion of symmetry as a test. Interest in exploring this notion is evident. Perhaps further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.") (citations omitted). Justice Kennedy's support for partisan symmetry is tepid at best, but he left room for partisan symmetry to play some role in the analysis. Id. at 419-20 (opinion of Kennedy, J.)) ("Without altogether discounting its utility in redistricting planning and litigation, I would conclude asymmetry alone is not a reliable measure of unconstitutional partisanship."). See also id. at 468 n.9 (Stevens, J., concurring in part and dissenting in part) ("I appreciate Justice Kennedy's leaving the door open to the use of the [partisan symmetry] standard in future cases.").

Much of defendants' remaining argument is devoted to mischaracterizations of plaintiffs' proposed standard. For example, defendants argue that plaintiffs' test does not take into account traditional districting principles or the reasons unrelated to partisan intent that voters of a particular party might be "cracked" or "packed," such as the natural concentration of Democrats into urban areas. Dfts.' Br., dkt. #25, at 22-23. In addition, defendants say that, under plaintiffs' proposed standard, the 2002 Wisconsin Assembly plan would be unconstitutional

because it had a large efficiency gap, even though it was drawn by a court. Id. at 24.

These arguments rely on the assumption that plaintiffs' proposed standard consists of nothing except a calculation of the efficiency gap. Defendants simply have ignored step one and step three of plaintiff's standard. Even if the plaintiffs were able to establish that the efficiency gap is a sufficiently strong pillar to support a constitutional violation, the plaintiffs still must prove partisan intent (step one). The defendants also might be able to show that a large efficiency gap is justified by a legitimate state interest, which may include traditional districting criteria such as equal population, compliance with the Voting Rights Act, compactness, respect for political subdivisions or respect for communities of interest (step three).

We have reviewed defendants' remaining arguments and conclude that they are unpersuasive or premature. A determination whether plaintiffs' proposed standard is judicially manageable relies at least in part on the validity of plaintiffs' expert opinions, which we must accept as true in the context of a motion a dismiss. A more developed record may show that plaintiffs' claims cannot be legally distinguished from the partisan gerrymandering claims that the Supreme Court has rejected in the past. However, current law does not foreclose plaintiffs' claims and those claims are modeled after a standard that the Supreme Court has adopted in

other contexts. Accordingly, we conclude that plaintiffs have stated a claim for relief that is plausible on its face and we are denying defendants' motion to dismiss.

ORDER

IT IS ORDERED that the motion to dismiss filed by defendants Gerald C. Nichol, Thomas Barland, John Franke, Harold V. Froehlich, Elsa Lamelas,Timothy Vocke and Kevin J. Kennedy, dkt. #24, is DENIED.

Entered this 17th day of December, 2015.

BY THE COURT:

/s/

KENNETH F. RIPPLE
Circuit Judge

/s/

BARBARA B. CRABB
District Judge

/s/

WILLIAM C. GRIESBACH
District Judge

Cross-References to Supplemental Appendix

Use of Efficiency Gap in Analyzing Partisan Gerrymandering, Professor Nicholas Goedert (ECF No.51) appears at: SA1–25

Analysis of the Efficiency Gaps of Wisconsin's Current Legislative District Plan and Plaintiffs' Demonstration Plan, Dr. Kenneth R. Mayer (ECF No. 54) appears at: SA26–98

Declaration of Sean Trende (ECF No. 55) appears at: SA99–146

Rebuttal Report: Response to Expert Reports of Sean Trende and Nicholas Goedert, Dr. Kenneth R. Mayer (ECF No. 59-2) appears at: SA147–198

Assessing the Current Wisconsin State Legislative Districting Plan, Professor Simon Jackman (ECF No. 62) appears at: SA179–254

Rebuttal Report, Professor Simon Jackman (ECF No. 63) appears at: SA255–281

Opinion and Order Denying Defendants' Motion for Summary Judgment

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM WHITFORD, ROGER ANCLAM, EMILY BUNTING, MARY LYNNE DONOHUE, HELEN HARRIS, WAYNE JENSEN, WENDY SUE JOHNSON, JANET MITCHELL, ALLISON SEATON, JAMES SEATON, JEROME WALLACE and DONALD WINTER,

Plaintiffs,

v.

GERALD C. NICHOL, THOMAS BARLAND, JOHN FRANKE, HAROLD V. FROEHLICH, KEVIN J. KENNEDY, ELSA LAMELAS and TIMOTHY VOCKE,

Defendants.

OPINION AND ORDER

15-cv-421-bbc

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The question in this case is whether Wisconsin Act 43—the 2012 districting plan for the Wisconsin Assembly—is an unconstitutional partisan gerrymander. Plaintiffs are Wisconsin residents and Democratic voters who allege that the plan is "one of the worst partisan gerrymanders in modern American history." Cpt. ¶ 1, dkt. #1. In particular, plaintiffs allege that Republican legislators drew the plan in secret, in consultation with a political scientist and without any input from Democrats, in an attempt to maximize Republican wins and minimize Democratic influence over the political process for as long as the plan was in place. In addition, plaintiffs allege that Republicans were successful in their attempt, gaining significantly more Assembly seats in 2012 and 2014 than their level of public support suggests. As proof that Republicans unfairly manipulated district lines, plaintiffs created their own plan, which they say satisfies traditional districting criteria such as compactness, contiguity and respect for political subdivisions as well or better than Act 43 but treats Democrat and Republican voters much more equally.

In an order dated December 17, 2015, dkt. #43, we denied defendants' motion to dismiss after concluding that plaintiffs' allegations were sufficient to state a plausible claim for relief. Now defendants have filed a motion for summary judgment, dkt. #45, which is ready for review. In addition, plaintiffs have filed what they call a "motion in limine" to exclude the

opinions of one of defendants' named experts, Sean Trende. Dkt. #70.

Defendants raise many important points in their summary judgment submissions. It may be that one or more of these objections carries the day in the end. However, we believe that deciding the case now as a matter of law would be premature because there are factual disputes regarding the validity of plaintiffs' proposed measurement for determining the existence of a constitutional violation. Accordingly, we deny defendants' motion for summary judgment and allow the case to proceed to trial.

We are also denying plaintiffs' motion in limine without prejudice to plaintiffs' renewing the motion at the conclusion of trial. Plaintiffs raise significant objections in their motion. However, because it is not necessary to consider Trende's opinions in order to resolve the motion for summary judgment and because the trial will be to a court rather than to a jury, we believe the prudent course of action is to rule on the admissibility of Trende's opinions after he has an opportunity to testify. Metavante Corp. v. Emigrant Savings Bank, 619 F.3d 748, 760 (7th Cir. 2010) ("[T]he court in a bench trial need not make reliability determinations [regarding experts] before evidence is presented."); In re Salem, 465 F.3d 767, 777 (7th Cir. 2006) ("[W]here the factfinder and the gatekeeper are the same, the court does not err in admitting the [expert] evidence subject to the ability later to exclude it or disregard it if it turns out not to

meet the standard of reliability established by Rule 702.").

To accommodate a court scheduling conflict, the trial will begin on Tuesday, May 24, 2016, at 9:00 a.m. The parties should be prepared to finish the trial in four days.

OPINION

In the order denying the motion to dismiss, we considered three issues: (1) whether challenges to a partisan gerrymander were justiciable; (2) whether plaintiffs had standing to sue; and (3) whether plaintiffs stated a plausible claim for relief. We answered each of these questions in the affirmative. Because defendants do not raise any new arguments about justiciability or standing in their summary judgment submissions, we see no reason to discuss those issues in this opinion. Instead, we will focus on whether plaintiffs have raised any genuine issues of material fact with respect to the various objections raised in defendants' motion for summary judgment. Fed. R. Civ. P. 56.

A. Legal Background

As the parties well know, there is much uncertainty in the law regarding partisan gerrymandering. Although the Supreme Court has well-established tests for analyzing alleged gerrymanders with respect to race, e.g., Miller v.

Johnson, 515 U.S. 900, 916-17 (1995), and equal population, e.g., Evenwel v. Abbott, No. 14-940, 2016 WL 1278477, at *3 (U.S. Apr. 4, 2016); Brown v. Thomson, 462 U.S. 835, 842-43 (1983), the Court has struggled to determine the appropriate test for gerrymanders based on political affiliation. In Davis v. Bandemer, 478 U.S. 109, 118-27 (1986), a majority of the Court agreed that partisan gerrymander claims are justiciable under the equal protection clause and that the plaintiffs must prove a discriminatory intent and a discriminatory effect. However, the Court could not agree on a specific standard to apply, particularly with respect to determining a discriminatory effect. Compare Bandemer, 478 U.S. at 133 (plurality opinion) ("[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."), with id. at 161 (Powell, J., concurring in part and dissenting in part) (question is whether legislature acted solely for partisan ends to the exclusion of "all other neutral factors relevant to the fairness of redistricting").

In Vieth v. Jubelirer, 541 U.S. 267 (2004), four Justices concluded that Bandemer should be overruled because partisan gerrymanders present political questions that cannot be answered by federal courts. Id. at 305 (plurality opinion). Four other Justices agreed that the Bandemer plurality did not provide a workable standard, but they disagreed with the plurality regarding justiciability and they

proposed alternative standards for reviewing a partisan gerrymandering claim. Compare Vieth, 541 U.S. at 339 (Stevens, J., dissenting) (question is "whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles"), with Vieth, 541 U.S. at 346-51 (Souter, J., dissenting) (proposing burden-shifting framework modeled after McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)), and Vieth, 541 U.S. at 360-61 (Breyer, J., dissenting) (question is whether there was "unjustified use of political factors to entrench a minority in power").

In the middle, Justice Kennedy concluded that neither the Justices nor the parties had provided a workable standard, but he declined to close the door on future partisan gerrymandering claims. Id. at 306-08 (Kennedy, J., concurring in the judgment). Rather, he stated that "courts should be prepared to order relief" if "workable standards do emerge." Id. at 317. He suggested that future cases could be guided not just by the equal protection clause but also by the First Amendment, focusing on the question whether a plan "burden[s] or penaliz[es] citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." Id. at 314. See also Baldus, 849 F. Supp. 2d at 853 ("[P]erhaps the Court will find some day that the First Amendment also protects persons against state action that intentionally uses their partisan affiliation to affect the weight of their vote.").

Finally, in League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006), the Court assumed that partisan gerrymanders are justiciable, but a majority concluded that the plaintiffs had failed to identify "a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution." Id. at 414. Again, the dissenting Justices proposed alternative standards in line with those they proposed in Vieth. Compare LULAC, 548 U.S. at 474 (Stevens, J., concurring in part and dissenting in part), with LULAC, 548 U.S. at 391-92 (Breyer, J., concurring in part and dissenting in part).

Since LULAC, the Supreme Court has not considered a partisan gerrymandering claim. Thus, it is left to parties bringing those claims and the lower courts considering them to continue to search for a workable standard that reflects a voter's right to "fair and effective representation." Reynolds v. Sims, 377 U.S. 533, 565 (1964). See also Baldus, 849 F. Supp. 2d at 853 ("Justice Kennedy's pivotal opinion [in Vieth] appeared to throw the ball to the litigating parties to come up with a manageable legal standard.").

B. Plaintiffs' Proposed Standard

In this case, plaintiffs' proposed test adopts the basic structure of a claim brought under the equal protection clause, which generally requires a showing of discriminatory intent and discriminatory effect.

Bandemer, 478 U.S. at 127 (plurality opinion) (citing City of Mobile, Alabama v. Bolden, 446 U.S. 55, 67–68 (1980)). Perhaps in response to Justice Kennedy's opinion in Vieth, plaintiffs' complaint includes a claim under the First Amendment as well, but at this point, neither side has developed a separate argument under the First Amendment or identified any analytical differences between plaintiffs' First Amendment and equal protection claims.

Plaintiffs' proposed test has three parts. First, the plaintiffs must show that the defendants acted with discriminatory intent. More specifically, plaintiffs frame the question as whether the "plan was designed with the intention of benefiting one party and disadvantaging its adversary." Plts.' Br., dkt. #68, at 58. At oral argument, plaintiffs summarized this element as an intent to disadvantage on the basis of political affiliation and they said that they modeled the element on the standard in Bandemer. Trans., dkt. #89, at 47.

Plaintiffs' most significant innovation in their test is the second part, with respect to discriminatory effect. Under this part, the plaintiffs must show that the plan "exhibited a high and durable level of partisan asymmetry in the first election after redistricting." Id. at 59. Plaintiffs define "partisan symmetry" as "the idea that the electoral system should treat similarly-situated parties equally, so that they are able to convert their popular support into legislative representation with approximately

equal ease." Id. at 49 (internal quotations omitted). Plaintiffs say that partisan symmetry provides an appropriate basis for evaluating discriminatory effect because several Justices in LULAC relied on it or otherwise discussed it favorably. E.g., LULAC, 548 U.S. at 466 (Stevens, J., concurring in part and dissenting in part) (partisan symmetry is "undoubtedly a reliable standard for measuring a burden on the complainants' representative rights") (internal quotations omitted); id. at 483-84 (Souter, J., concurring in part and dissenting in part) ("[N]or do I rule out the utility of a criterion of symmetry as a test. Interest in exploring this notion is evident. Perhaps further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.") (internal citations omitted). See also id. at 420 (opinion of Kennedy, J.) (declining to "altogether discount[] [partisan symmetry's] utility in redistricting planning and litigation").

In addition, plaintiffs say that partisan symmetry reflects the Supreme Court's description of partisan gerrymandering in other cases. Arizona State Legislature v. Arizona Independent Redistricting Commission, 135 S. Ct. 2652, 2658 (2015) (partisan gerrymandering is "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power"); Vieth, 541 U.S. at 271 n.1 (plurality opinion) (gerrymandering is "giv[ing] one political party an unfair advantage by diluting the opposition's voting strength") Bandemer,

478 U.S. at 127 (plurality opinion) (gerrymandering is "the manipulation of individual district lines" causing a party's "voters over the State as a whole" to be "subjected to unconstitutional discrimination."). See also Vieth, 541 U.S. at 335 (Stevens, J., dissenting) ("Gerrymandering always involves the drawing of district boundaries to maximize the voting strength of the dominant political faction and to minimize the strength of one or more groups of opponents.").

Finally, plaintiffs say that partisan symmetry is widely accepted among scholars as the most appropriate way to measure partisan fairness. Plts.' Br., dkt. #68, at 50 (citing Bernard Grofman & Gary King, The Future of Partisan Symmetry As A Judicial Test for Partisan Gerrymandering After *Lulac v. Perry*, 6 Election L.J. 2, 6 (2007) ("We are aware of no published disagreement or even clear misunderstanding in the scholarly community about partisan symmetry as a standard for partisan fairness in plurality-based American elections since [1987.]")).

Plaintiffs measure partisan symmetry with a metric they call the "efficiency gap," which is a figure that represents the difference between the parties' "wasted votes" in an election. A vote is "wasted" under this analysis if it is either (1) cast for a candidate who lost the election or (2) cast for the winning candidate, but in excess of what the candidate needed to win. Plts.' PFOF ¶ 6, dkt. #79. The efficiency gap for a particular election is the

difference between the parties' total wasted votes among all of the districts, divided by the total number of votes cast.

In the December 17, 2015 order, we noted the following example of an efficiency gap calculation provided in plaintiffs' complaint:

> Suppose, for example, that there are five districts in a plan with 100 voters each. Suppose also that Party A wins three of the districts by a margin of 60 votes to 40, and that Party B wins two of them by a margin of 80 votes to 20. Then Party A wastes 10 votes in each of the three districts it wins and 20 votes in each of the two districts it loses, adding up to 70 wasted votes. Likewise, Party B wastes 30 votes in each of the two districts it wins and 40 votes in each of the three districts it loses, adding up to 180 wasted votes. The difference between the parties' respective wasted votes is 110, which, when divided by 500 total votes, yields an efficiency gap of 22% in favor of Party A.

Cpt. ¶ 50, Dkt. #1.[1]

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[1] It would seem that the number of wasted votes for the winner should be one vote less than what plaintiffs' calculation suggests for each district. In this example, the party would need 51votes to win, so Party A would have nine rather than ten

The purpose of the efficiency gap is to capture in one number the extent to which voters of a particular party are "packed" and "cracked." Packing means concentrating one party's supporters in a few districts so that they win by overwhelming margins. Cracking means dividing a party's supporters among multiple districts so that they fall short of a majority in each one. Vieth, 541 U.S. at 287 n.7. Plaintiffs say that a high level of cracking and packing (and thus a large efficiency gap) is indicative of discriminatory effect because, all things being equal, the number of wasted votes for both parties should be about the same. Moreover, plaintiffs say that if a plan produces an efficiency gap of greater than 7 percent after the first election, subsequent elections under the same plan are highly likely to continue to be skewed in favor of the same party, even if another party significantly increases its vote share. Plts.' PFOF ¶¶ 12, 85-93, 114-18, 154, 170, dkt. #79. Thus, plaintiffs believe that an efficiency gap of more than 7 percent, combined with a showing of discriminatory intent, should trigger a presumption that the districting plan is unconstitutional.

Plaintiffs identify an alternative measure of partisan symmetry called "partisan bias," which they defined previously as "the difference between the

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wasted votes for each district it won (60-51=9) and Party B would have 29 rather than 30 wasted votes for the districts it won (80-51=29). Regardless, the parties do not discuss this potential discrepancy, so we need not consider it.

shares of seats that the parties would win if they each received the same share of the statewide vote." Plts.' Br., dkt. #31, at 9. However, neither side develops an argument in their briefs regarding the application of partisan bias to this case. At oral argument, plaintiffs suggested that partisan bias could be used as a kind of "robustness check" on the accuracy of the efficiency gap. Trans., dkt. #89, at 70. Because the parties did not explore this issue in their briefs, we decline to consider it at this time.

Finally, under the third part of plaintiffs' proposed test, if plaintiffs prove both discriminatory intent and discriminatory effect, the burden shifts to defendants. In particular, the defendants must show that the plan's "severe asymmetry" was "unavoidable" in light of "the state's political geography and legitimate redistricting objectives." Plts.' Br., dkt. #68, at 1, 59. Plaintiffs say that they modeled this part of their test after the equal apportionment cases, in which the burden shifts to the state to justify a plan if the plaintiffs show more than a ten percent population deviation among the districts. E.g., Brown, 462 U.S. 835 at 842-43.

C. Application of Plaintiffs' Standard

For the purpose of their motion for summary judgment, defendants do not deny that plaintiffs could prove their claim under their proposed standard. With respect to the first element, discriminatory intent, plaintiffs allege that

Republican leaders in the state legislature hired a law firm and a political scientist to design an Assembly plan that would maximize the electoral advantage of Republicans. In particular, plaintiffs allege that the Republicans used past election results to measure the partisanship of the electorate and then to design districts that would either "crack" Democratic voters (dividing them into multiple districts to prevent them from reaching a majority) or "pack" those voters (concentrating them into a small number of districts). In this way, Republicans hoped to maximize the number of districts that would elect a Republican and minimize the number of districts that would elect a Democrat. Republican leaders drafted the plan in secret, without any input from Democrats, and then enacted the plan as Act 43 with little debate. Baldus, 849 F. Supp. 2d at 845, 851 (summarizing process of enacting Act 43 and finding statements that drafters were not influenced by partisan factors "to be almost laughable"). During oral argument, defendants conceded that plaintiffs can prove this element of the test as plaintiffs have framed it. Trans., dkt. #89, at 9, 88.[2]

With respect to the second element, discriminatory effect, plaintiffs' expert Simon Jackman, a political scientist, measured a 13 percent efficiency gap in the Republicans' favor for the 2012 Assembly election; plaintiff's other expert, Kenneth

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[2] They have not conceded, however, that the plaintiffs could meet a more demanding showing of partisan intent. Trans., dkt. #89, at 88.

Mayer, also a political scientist, calculated a 12 percent pro-Republican efficiency gap, using a more elaborate method. Plts.' PFOF ¶¶ 10 and 15, dkt. #79. (Mayer used the "full form" method, which means that he tallied wasted votes district by district. Id. at ¶ 120. Jackman used the "simplified" method, using the formula (S – 0.5) – 2(V – 0.5), where S was a party's statewide seat share and V was a party's statewide vote share. Id. at ¶ 121.) These election results, plaintiffs say, were consistent with what the legislature's consultant predicted when he aided the Republicans in drafting the plan. Id. at ¶ 97. It is undisputed that, from 1972 to 2010, not a single legislative map in the country was as asymmetric in its first two elections as those generated in 2012 and 2014 Wisconsin Assembly elections. Id. at ¶ 11. According to Jackman, the map is so skewed in favor of the Republicans that there is a nearly 100 percent chance that the plan will continue to disadvantage Democrats, as measured by the efficiency gap, throughout the life of the plan. Id. at ¶¶ 11, 84.

With respect to the third element, whether the Republican advantage can be justified by neutral reasons, defendants have made no effort in their summary judgment submissions to defend Act 43 on neutral grounds. However, as evidence that Act 43 cannot be justified by neutral measures, plaintiffs submitted their own proposed plan, which plaintiffs say has a much smaller efficiency gap of 2 percent in favor of Republicans, but still satisfies other

legitimate districting criteria at least as well as Act 43. Plts.' PFOF ¶¶ 16, 142.

D. Defendants' Challenges to Plaintiffs' Standard

Rather than challenge plaintiffs' ability to meet the standard, defendants challenge the standard itself. However, a review of defendants' objections show that there are fact issues that need to be resolved at trial.

1. Efficiency gap

a. Efficiency gap as a measure of discriminatory effect

The bulk of defendants' objections relate to plaintiffs' proposed measure of discriminatory effect, the efficiency gap. Of these, the primary objection seems to be that the efficiency gap is not a good measure of discriminatory effect because even seemingly neutral plans can have a large efficiency gap. For example, defendants point to Wisconsin's 2002 Assembly plan. Although a federal court drew that plan (based on plans submitted by the political parties), Baumgart v. Wendelberger, No. 01-C-0121, 2002 WL 34127471, at *4 (E.D. Wis. May 30, 2002) amended, No. 01-C-0121, 2002 WL 34127473 (E.D. Wis. July 11, 2002), the efficiency gap for the plan was 7.5 percent in favor of the Republicans in 2002 and then fluctuated between 4 percent and 12 percent in favor of the Republicans for the remainder of the

decade. Dfts.' PFOF ¶¶ 212-216, dkt. #74. Defendants also point to other states that have had pro-Republican efficiency gaps of more than 5 percent in recent years, even when the plan was drawn by a neutral body. Dfts.' Br., dkt. #46, at 38. More generally, defendants rely on the opinion of one of their experts, Sean Trende, to argue that legislative plans in Wisconsin and around the country are more likely to favor Republicans in recent years because of political geography, not partisan intent. Dfts.' Br., dkt. #48, at 26-30; Dfts.' PFOF ¶¶ 234-45, dkt. #74. In other words, defendants argue that Democrats are naturally packed into a smaller number of districts, which makes it more likely that their share of the votes statewide will be greater than their share of the legislative seats.

In response, plaintiffs say that Wisconsin's 2002 plan is an anomaly. The average efficiency gap for the Wisconsin Assembly in the 1970s, 1980s and 1990s ranged between 0.3 percent and 2.4 percent. Plts.' PFOF ¶¶ 44-46, dkt. #79. Further, plaintiffs say that the efficiency gap may have been high in the 2002 plan because the court adopted a plan more similar to the one proposed by Republicans. Plts.' Br., dkt. #68, at 18. As a general rule, plaintiffs say, it is much more common for plans drafted by one party to have a significantly larger efficiency gap than plans drafted through a nonpartisan or bipartisan process. Plts.' PFOF ¶ 174, dkt. #79.

In any event, plaintiffs say that political geography does not explain why efficiency gaps in Wisconsin and elsewhere have become increasingly pro-Republican in recent decades. Rather, according to Mayer, Democrats and Republicans in Wisconsin have comparable spatial distributions. Plts.' PFOF ¶¶ 51-58, dkt. #79. More generally, plaintiffs cite evidence that there is no national trend of increasing Democratic clustering. Id. at ¶¶ 26-27. Rather, plaintiffs say, the reason for larger efficiency gaps favoring Republicans is increasing Republican control of state legislatures. Id. at ¶¶ 49-50, 58, 156. If control over state legislatures had remained constant, efficiency gaps across the country would have remained relatively constant as well, including in Wisconsin. Id. at ¶¶ 23-24, 31, 49-50, 58, 156.

Defendants disagree with some of plaintiffs' conclusions, but they do not object to the admissibility of their experts' opinions. Accordingly, we conclude that there is a genuine dispute on the question whether a large efficiency gap is a strong indicator of a discriminatory effect.

In their reply brief and at oral argument, defendants seemed to concede that there is a genuine dispute on this issue, but they argued that the dispute is not material because the mere existence of large efficiency gaps in plans adopted by neutral bodies is sufficient to discredit the efficiency gap as a tool for measuring a constitutional violation. We are not willing to go that far, at least not in the context of a

motion for summary judgment. Plaintiffs are not arguing that voters have a right to equal results such that any plan with a large efficiency gap must be invalidated. Rather, they are arguing that they have a right to be free from being *intentionally disadvantaged* when they vote. This is consistent with case law under both the First Amendment and the equal protection clause, which recognizes that there are many instances in which a government act or policy may have a disparate impact even in the absence of intentional discrimination and that disparate impact alone is not enough to sustain a constitutional claim. Bond v. Atkinson, 728 F.3d 690, 692-93 (7th Cir. 2013) ("[T]he Supreme Court held in Washington v. Davis, 426 U.S. 229 (1976), that disparate impact does not violate the equal protection clause of the fourteenth amendment."); Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez, 561 U.S. 661, 700 (2010) (Stevens, J., concurring) ("[I]t is a basic tenet of First Amendment law that disparate impact does not, in itself, constitute viewpoint discrimination.") (citing cases). Defendants cite no authority for the view that discriminatory intent and discriminatory effect must be borne out by the same evidence.

As an alternative to their broader argument that the efficiency gap is inherently a poor measure of discriminatory effect, defendants say that what is considered a neutral efficiency gap should not be zero. This is because using zero as a baseline does not

isolate the portion of the efficiency gap that is attributable to partisan bias. Dfts.' Br., dkt. #46, at 36. Rather, defendants say that the baseline should incorporate whatever natural advantage a party has as a result of political geography.

Defendants raise an interesting point that may be worth exploring at trial, but we do not believe that it is a ground for granting summary judgment. At most, this is a suggestion to alter the threshold of the plaintiffs' test and, perhaps, shift the burdens of production or proof. Because it is genuinely disputed whether Wisconsin's political geography has played a significant role in contributing to Act 43's efficiency gap, an adjustment to the baseline would not be dispositive at this stage of the case. However, if the facts show at trial that political geography can and does have an impact on Wisconsin's and other states' efficiency gaps, then that would support a view that some burden should be placed on plaintiffs to show as part of their prima facie case the extent to which political geography cannot explain the efficiency gap generated by Act 43.

b. Other objections to the efficiency gap

Defendants raise various other objections, both to the efficiency gap as a general concept for measuring discriminatory effect and to the way that plaintiffs have chosen to implement the efficiency gap in this case: (1) plaintiffs' experts made assumptions about incumbency and voter turnout that undermine the

accuracy of the efficiency gap; (2) by calculating the efficiency gap using the results of only one election, plaintiffs cannot show that the efficiency gap will be a predictable and reliable indicator of discriminatory effect throughout the life of a districting plan; (3) plaintiffs' experts failed to come up with a consistent way to calculate the efficiency gap; (4) plaintiffs' experts did not include all the data that they should have in their analyses; (5) plaintiffs' standard implies that they have a constitutional right to an efficiency gap favoring the Democrats; (6) the efficiency gap constitutionalizes a proportionality standard; and (7) a large number of districting plans around the country have what plaintiffs view as an unreasonably large efficiency gap.

The first four of these objections require little discussion because it is clear that plaintiffs have raised factual disputes requiring a trial. In particular, with respect to the use of assumptions about incumbency and voter turnout, plaintiffs' experts conducted additional analysis (what they call "robustness checks") to make sure their assumptions did not have a significant effect on their results. Plts.' PFOF ¶¶ 94-113. Defendants are free to argue at trial that plaintiffs' methods are not sufficiently reliable to be helpful in determining a constitutional violation.

With respect to the reliability of the efficiency gap to predict whether the same party will have an unfair advantage in future elections, plaintiffs cite expert evidence that historically a large initial efficiency gap

has been a very strong indicator of a large efficiency gap throughout the life of the districting plan. Plts.' PFOF ¶¶ 80-84, 89-93, 166-69, dkt. #79. In addition, plaintiffs' experts conducted "sensitivity testing" in order to control for swings in elections; the results of that testing did not undermine their conclusions regarding the reliability of the efficiency gap. Id. at ¶¶ 85-88, 114-18, 154, 170. With respect to the differences between plaintiffs' "full form" and "simplified" methods for calculating an efficiency gap, plaintiffs cite evidence that there is little practical difference between the result generated by the methods, so the choice of method does not affect the measure's viability. Id. at ¶ 122-35. Finally, defendants' arguments about data that plaintiffs' experts should have included in their analysis are classic examples of issues that can be raised during cross examination at trial. Manpower, Inc. v. Insurance Co. of Pennsylvania, 732 F.3d 796, 809 (7th Cir. 2013) ("Assuming a rational connection between the data and the opinion—as there was here—an expert's reliance on faulty information is a matter to be explored on cross-examination; it does not go to admissibility. Our system relies on cross-examination to alert the jury to the difference between good data and speculation.") (internal quotations omitted).

Defendants may be able to show at trial that the court should not accept plaintiffs' version of the facts. Again, however, defendants do not object to the

admissibility of plaintiffs' evidence, so we cannot resolve these issues on summary judgment.

Defendants' last three objections require more analysis. These are discussed below.

a. Implications of plaintiffs' durability threshold

As noted above, plaintiffs argue that an efficiency gap of seven percent or greater should qualify as a discriminatory effect under their test. Plaintiffs chose seven percent as a threshold in part because of their experts' opinion that a plan with such a large gap is "durable," meaning that the plan is likely to continue to give the majority party an advantage in subsequent elections under the plan, even if the minority party increases its vote share. Plts.' PFOF ¶¶ 12, 85-93, 114-18, 154, 170, dkt. #79.

Defendants argue that plaintiffs do not have a right to an efficiency gap that favors Democrats, Dfts.' Reply Br., dkt. #73, at 23, but this appears to be a misinterpretation of plaintiffs' position. Plaintiffs are not saying that they have a right to regain control of the legislature. Rather, plaintiffs say that they picked a threshold that was durable in an attempt to answer the question raised repeatedly by the Supreme Court, which is how extreme the discriminatory effects of the gerrymander must be, or, in other words, "how much is too much." Vieth, 541 U.S. at 298–99 (plurality opinion). Justice Breyer echoed this view when he said that court intervention

should be limited to "the unjustified use of political factors to *entrench* a minority in power." Vieth, 541 U.S. at 360 (Breyer, J., dissenting) (emphasis added). However, other members of the Court want more specificity. In Vieth, 541 U.S. at 307-08, Justice Kennedy expressed the need "to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights." This is exactly what plaintiffs are attempting to do with the efficiency gap.

Focusing on durability makes some sense because it is an indication that ordinary political processes cannot fix the problem, so court intervention is needed. Reynolds v. Sims, 377 U.S. 533, 553-54 (1964) (in context of gerrymandering claim for population deviations, recognizing that "[n]o effective political remedy to obtain relief against the alleged malapportionment . . . appears to have been available"); Vieth, 541 U.S. at 361 (Breyer, J., dissenting) ("Where unjustified entrenchment takes place, voters find it far more difficult to remove those responsible for a government they do not want; and these democratic values are dishonored."). Focusing specifically on the life span of the plan also makes obvious sense because the political landscape changes each time a new plan is enacted. Defendants do not challenge plaintiffs' view that durability is an appropriate measure of discriminatory effect, so we need not resolve that issue in this opinion. It is enough to say that a judgment in plaintiffs' favor

would not give plaintiffs or anyone else a constitutional right to gain control of the legislature or to draw a plan that is biased in their favor.

b. Efficiency gap as a constitutional requirement for "hyper-proportional" representation

Defendants say that the efficiency gap is an inadequate measurement of a plan's partisan effect because it is "a measure of proportionality," Dfts.' Br., dkt. #46, at 47, which the Supreme Court has said repeatedly is not required by the Constitution. E.g., LULAC, 548 U.S. at 419 ("[T]here is no constitutional requirement of proportional representation."); Bandemer, 478 U.S. at 132 (plurality opinion) ("[T]he mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination."). Defendants seem to acknowledge that plaintiffs' test does not require proportional representation per se, in the sense that a party's seat share must be the same as that party's share of votes. Rather, defendants say that plaintiffs' standard requires what defendants call "hyper-proportionality." Dfts.' Br., dkt. #46, at 48. This is because, under plaintiffs' "simplified method" for calculating the efficiency gap, the efficiency gap remains zero only if the party receiving more than 50 percent of the vote receives a 2 percent increase in its share of the seats for every 1 percent increase in its share of the votes. Plts.' PFOF ¶ 136, dkt. #79. For example, 51 percent of the votes would translate into 52 percent of the seats, 52 percent of the votes would translate into 54 percent of

the seats and 75 percent of the votes would translate to 100 percent of the seats. Perhaps "hyper-majoritarianism" would be a more accurate name for defendants' objection because the formula suggests that a majority of voters should have an even larger majority of seats.

Defendants' argument is important, but it would be premature to conclude that precedent forecloses plaintiffs' claim because of this formula. For one thing, plaintiffs say that the ratio is not a normative requirement of their test; it is simply what happens when a districting plan treats the parties symmetrically. Plts.' PFOF ¶ 145, dkt. #79. This seems to be borne out by history, which shows that a 1 percent increase in vote share generally leads to a two percent increase in seat share. Plts.' PFOF ¶¶ 137-39, 146, dkt. #79. See also LULAC, 548 U.S. at 464-65 (Stevens, J., concurring in part and dissenting in part) ("[O]ur electoral system tends to produce a 'seat bonus' in which a party that wins a majority of the vote generally wins an even larger majority of the seats.").

Further, plaintiffs' standard does not require a 2:1 ratio between seat share and vote share. The efficiency gap is only part of plaintiffs' test, so no claim can prevail simply because a districting plan produces a particular vote share to seat share ratio. Even without considering the other elements of the standard, the 2:1 ratio appears in plaintiffs' formula only when the efficiency gap is zero. Plts.' PFOF ¶

136, dkt. #79. Because plaintiffs' standard allows for a significant deviation from a zero efficiency gap, it also allows for a significant deviation from the 2:1 ratio. Id. at ¶ 148.

Perhaps defendants mean to make a more subtle point, which is that the efficiency gap is an improper measure simply because it treats a particular vote share to seat share ratio as the "ideal" result. Again, however, the "ideal" result proposed by plaintiffs is the situation in which no voter has an unfair advantage over another in obtaining representation by the party of his or her choice. Defendants have not cited any authority that forecloses plaintiffs' view, but both parties should be prepared to present evidence on this point at trial.

Further, it is likely that any objective standard for measuring partisan gerrymandering will have some connection to the basic principle that the collective will of the people should not be subverted indefinitely by an entrenched minority, a principle long recognized by the Supreme Court. Reynolds, 377 U.S. at 565 ("[L]egislatures . . . should be bodies which are collectively responsive to the popular will."). As the plurality in Bandemer recognized, "a preference for a level of parity between votes and representation sufficient to ensure that significant minority voices are heard and that majorities are not consigned to minority status, is hardly an illegitimate extrapolation from our general majoritarian ethic and the objective of fair and adequate representation

recognized in Reynolds." Bandemer, 478 U.S. at 126 n.6. Opinions by other Justices reflect the same basic understanding. LULAC, 548 U.S. at 419 (opinion of Kennedy, J.) ("[A] congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority."); LULAC, 548 U.S. at 467-68 (Stevens, J., concurring in part and dissenting in part) (districting plan is presumptively unconstitutional if equal share of votes for two parties produces large seat differential because in that case the plan "imposes ... a significant disadvantage on a politically salient group of voters"); Vieth, 541 U.S. at 352 n.7 (Souter, J., dissenting) ("[T]he Constitution guarantees no right to proportional representation ... It does not follow that the Constitution permits every state action intended to achieve any extreme form of disproportionate representation."); Vieth, 541 U.S. at 360-61 (Breyer, J., dissenting) (gerrymandering that allows "a party that enjoys only minority support among the populace ... to take, and hold, legislative power ... violates basic democratic norms").

Perhaps at trial it will become clear that the efficiency gap cannot be reconciled with Supreme Court precedent. At this stage, however, we are not persuaded that defendants have made that showing.

c. Potential breadth of plaintiffs' standard

Defendants say that plaintiffs' test is not "limited and precise" as Justice Kennedy suggested it should be in Vieth, 541 U.S. at 306 (Kennedy, J., concurring in the judgment), because such a large number of state districting plans across the country have an efficiency gap of at least seven percent. According to plaintiffs' own experts, approximately 20 to 25 percent of plans adopted by a party with unified control of the state government (both houses and the governorship) have an initial efficiency gap of seven percent or more. Plts.' PFOF ¶¶ 69, 74, dkt. #79. (The parties agree that unified control of the government generally leads to an attempt to manipulate districts for partisan gain, though plaintiffs point to examples in which that is not the case. Id. at ¶¶ 76 and 172 (citing plans enacted under unified party control in California, Maine and Vermont that did not lead to partisan gerrymanders).)

As an initial matter, plaintiffs say that the 20 to 25 percent figure is inflated because it does not take into consideration plans that can be justified with neutral reasons. More generally, plaintiffs say that, to the extent there is a large number of suspect plans, that is not evidence of a weakness of their test, but evidence that "the practice of partisan gerrymandering is ubiquitous and very severe." Trans., dkt. #89, at 76. They also argue that federal courts invalidated many districting plans after recognizing other types of gerrymandering claims, so the potential effect of plaintiffs' proposed standard on current districting plans should not be a reason to

reject the standard. Plts.' PFOF ¶¶ 77-78, dkt. #79 (citing Gary W. Cox & Jonathan N. Katz, Elbridge Gerry's Salamander (2002), and Ellen D. Katz et al., Documenting Discrimination in Voting: Judicial Findings under Section 2 of the Voting Rights Act, 39 U. Mich. J.L. Reform 643, 655 (2006)).

Of course, plaintiffs are correct that courts cannot decline their duty to enforce the Constitution simply because a ruling may have far reaching effects. However, we agree with defendants that the usefulness of the efficiency gap as a tool for measuring partisan effect may be lessened if a large efficiency gap is a common feature of districting plans. A theme in a number of opinions by Supreme Court Justices is that court intervention in partisan gerrymandering cases should be limited to rare and extreme circumstances. E.g., Bandemer, 478 U.S. at 133 (plurality opinion) (raising concern that "a low threshold for legal action would invite attack on all or almost all reapportionment statutes"); Vieth, 541 U.S. at 339 (Stevens, J., dissenting) (proposing what he described as "a narrow test [that] would cover only a few meritorious claims, but . . . would preclude extreme abuses"); Vieth, 541 U.S. at 354 (Souter, J., dissenting) (courts should be able to "identify at least the worst cases of gerrymandering"); Vieth, 541 U.S. at 362 (Breyer, J., dissenting) ("Courts need not intervene often to prevent the kind of abuse I have described."). This view could be undermined if we were to adopt a standard that rendered suspect a large swath of districting plans around the country.

Again, however, this objection is not a ground for granting summary judgment. As discussed above, the extent to which Wisconsin's and other states' efficiency gaps are caused by partisan bias is a disputed fact. If the facts at trial show that Wisconsin's efficiency gap is caused by neutral factors, then it will not be necessary to determine the potential implications of a ruling in plaintiffs' favor.

Further, this seems to be another objection that relates less to the validity of the efficiency gap as a general matter and more to the choice of how large an efficiency gap must be to sustain a constitutional claim. If plaintiffs' proposed formulation is not sufficiently demanding, this may support raising the threshold necessary to support a claim. Another possibility would be to incorporate into plaintiffs' prima facie case a requirement to show that any large efficiency gap cannot be justified by legitimate interests, possibilities the panel has not foreclosed.

Even if this court were to grant relief to plaintiffs, it might not be necessary to establish a threshold in this case. As plaintiffs point out, in the equal apportionment cases, the Supreme Court did not determine at first how large a population deviation must be in order to trigger a presumption of unconstitutionality. Rather, the Court proceeded on a case by case basis, settling on ten percent as the threshold only after several years. Nicholas O. Stephanopoulos & Eric M. McGhee, Partisan Gerrymandering and the Efficiency Gap, 82 U. Chi. L.

Rev. 831, 890-91 (2015). Because plaintiffs allege in this case that the efficiency gap created by Act 43 is one of the largest in recent history, determining a threshold may be something that can wait for another day. Bandemer, 478 U.S. at 123 ("arithmetic presumption" not necessary to adjudicate partisan gerrymandering claim).

2. Intent element

Plaintiffs' proposed element regarding intent requires them to prove that defendants disadvantaged plaintiffs intentionally on the basis of political affiliation. Plts.' Br., dkt. #68, at 58. In their opening brief, defendants limited their discussion of this element to an argument that a requirement to prove intent did not help to overcome the alleged problems with the efficiency gap as a measure of discriminatory effect. They did not challenge the validity of the element itself. However, in their reply brief, defendants argued for the first time that "plaintiffs' intent element is inconsistent with Supreme Court precedent" because it is not sufficiently demanding. Dfts.' Reply Br., dkt. #73, at 3. In particular, defendants rely on the plurality opinion in Vieth, 541 U.S. at 286, for the view that "partisan districting is a lawful and common practice," so that any successful partisan gerrymandering claim must show an "excess" of a partisan motive.

Because defendants did not raise this issue until their reply brief, we are not required to consider it. Narducci v. Moore, 572 F.3d 313, 324 (7th Cir. 2009) ("[T]he district court is entitled to find that an argument raised for the first time in a reply brief is forfeited."). However, we will discuss some of the potential issues raised by this element to provide guidance at trial.

In attempting to craft an intent element in a partisan gerrymandering case, a litigant or a court must navigate the minefield of Supreme Court precedent on this issue. In Vieth, 541 U.S. at 284, the plurality rejected a partisan gerrymandering standard that required a showing that the defendants acted with "a predominant intent to achieve partisan advantage." In LULAC, 548 U.S. at 418, the Court rejected a standard that required a showing that partisan gain was the "sole motive" for the map's design.

Perhaps cognizant of the Court's skepticism of heightened intent requirements, plaintiffs went back to Bandemer for their intent element. In that case, the plurality required only a showing of an intent to discriminate against an identifiable political group. Bandemer, 478 U.S. at 127 (plurality opinion). The plurality declined to adopt a more demanding intent requirement, even though it acknowledged that, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."

Id. at 128-29. In other words, the assumption is that members of a particular party generally will try to benefit themselves and hurt their adversaries.

In their opening brief, defendants seem to agree with the view that a heightened intent requirement would be inconsistent with Supreme Court precedent. Dfts.' Br., dkt. #46, at 41 ("If the intent element calls for a more searching inquiry, then the standard fails under Vieth" because "[t]he Vieth plurality and Justice Kennedy both rejected a standard that incorporated a 'predominant intent' standard."). Further, defendants did not directly criticize the intent requirement in Bandemer anywhere in their briefs or during oral argument. However, in their reply brief, defendants seem to suggest that a heightened intent element is *required* by Vieth. Thus, defendants' position now seems to be that there is no viable intent element for a partisan gerrymandering claim. Defendants reiterated that position during oral argument. When asked by the court what defendants believed the intent requirement should be, counsel stated, "I'm not sure that this is something that can be solved." Trans., dkt. #89, at 7.

As discussed above, a majority of the Supreme Court has directed litigants and lower courts to continue searching for an appropriate standard for deciding partisan gerrymandering claims. In light of that directive, it would be inappropriate to interpret prior case law as rejecting all formulations of the intent requirement for those claims.

During oral argument, plaintiffs' counsel stated her view that the Bandemer holding regarding intent remains controlling precedent, even after Veith and LULAC. Trans., dkt. #89, at 44. That view may be debatable, but the parties have not fully addressed that issue, so we believe that it would be premature to decide it now.

At least one Justice has questioned the constitutionality of any districting plan that disadvantages members of a particular party. Vieth, 541 U.S. at 324 (Stevens, J., dissenting) ("[T]he plurality errs in assuming that politics is 'an ordinary and lawful motive.' We have squarely rejected the notion that a 'purpose to discriminate on the basis of politics' is never subject to strict scrutiny.") (citation omitted). However, a majority of the Justices in Vieth appeared to accept the view that "[a] determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied," id. at 307 (Kennedy, J., concurring in the judgment). The plurality in Vieth identified the "excessive injection of politics" as the basis for a constitutional violation. Id. at 293 (plurality opinion). Justice Kennedy however, was more circumspect; he noted that "[e]xcessiveness is not easily determined." Id. at 316 (Kennedy, J., concurring in the judgment), and suggested focusing on evidence that a legislature's plan is unrelated to neutral districting criteria. Id. at 312-13.

At oral argument, other alternative formulations of intent emerged. One suggestion was that plaintiffs show that defendants had the intent to prevent the minority party from regaining control throughout the life of the districting plan. Trans., dkt #89, at 5-6.

Accordingly, it would be inappropriate to grant summary judgment on this ground. That being said, plaintiffs will have the burden at trial to prove that defendants acted with discriminatory intent, so they should be prepared to present the strongest evidence that they have on this issue—including comparative evidence of prior redistricting plans in the State of Wisconsin—in order to meet even the most demanding intent requirement. Specifically, the parties should be prepared to address the evidence bearing on intent in light of the Justices' concerns in Vieth, the discussion with this court at argument, and the parties own formulations on that element.

3. Burden shifting

If plaintiffs prove discriminatory intent and effect in steps one and two, plaintiffs' proposed test then shifts the burden to defendants to show that the large efficiency gap was "unavoidable" in light of the state's political geography and legitimate districting objectives. In their opening brief, defendants' primary objection to this portion of plaintiffs' test was really another objection to the efficiency gap. In particular, defendants argued that it was "fundamentally unfair" to shift the burden to

defendants because the efficiency gap was not an adequate measure of discriminatory effect. Dfts.' Br., dkt. #46, at 42. Because this is simply a repackaging of arguments that we have said we cannot resolve on a motion for summary judgment, it is unnecessary to consider this issue further.

In their reply brief, defendants argue that plaintiffs' standard is unfair because it will be impossible to show that a particular efficiency gap was "unavoidable." Rather, with the near-infinite number of ways to draw a plan, there will always be a way to "reverse-engineer a plan that has a better political result for one side while coming close in population deviation, compactness and municipal splits." Dfts.' Reply Br., dkt. #73, at 10. At oral argument, plaintiffs addressed this objection by stating that defendants would not "have to show that these particular district lines were absolutely necessary." Trans., dkt. #89, at 60. Rather, defendants would have to show that any alternative plan would have "roughly the same kind of excessive . . . efficiency gap." Id. We understand plaintiffs to mean that defendants would retain some flexibility in choosing how to draw district lines.

When asked at oral argument whether anyone on the Supreme Court had proposed a similar burden-shifting scheme as part of a partisan gerrymandering claim, plaintiffs' counsel's initial response was that no one had. Id. at 58. Instead, counsel stated that plaintiffs had adapted the burden-shifting portion of

their standard from cases involving equal apportionment, such as Voinovich v. Quilter, 507 U.S. 146 (1993), Brown, 462 U.S. 835, and Connor v. Finch, 431 U.S. 407, 414 (1977). Id. at 63. However, later in the argument, plaintiffs' counsel stated that a similar burden-shifting standard could be found in the partisan gerrymandering context in the plurality's opinion in Bandemer, in Justice Stevens's opinion in Karcher v. Daggett, 462 U.S. 725 (1983), and in Justice Souter's opinion in Vieth. Trans., dkt. #89, at 65.

The cases plaintiffs cite may support an argument that some type of burden-shifting is appropriate, but they do not support plaintiffs' view that defendants must show that their plan was "unavoidable." In Bandemer, 478 U.S. at 127-43, the plurality focused most of its opinion on the issue of discriminatory effect. Because the plurality found that the plaintiffs had not met their burden on that element, it did not have to go any further. However, in responding to Justice Powell's dissenting opinion, the plurality stated that the various factors he proposed in his test "might well be relevant to an equal protection claim." Bandemer, 478 U.S. at 141. The plurality elaborated, "[t]he equal protection argument would proceed along the following lines: If there were a discriminatory effect and a discriminatory intent, then the legislation would be examined for valid underpinnings." Id. However, because the plurality "found that there was insufficient discriminatory effect to constitute an equal protection violation," it "did not reach the

question of the state interests (legitimate or otherwise) served by the particular districts as they were created by the legislature." Id. at 141-42. Thus, although the plurality suggested that it would consider the state's interests as part of any test, the plurality did not specify which party should shoulder the burden on that issue.

Plaintiffs are correct that Justice Stevens and Justice Souter both proposed a burden-shifting standard for partisan gerrymandering claims, but neither of them proposed placing a burden on defendants as demanding as the one plaintiffs propose. In Karcher, 462 U.S. at 751, Justice Stevens stated that he "would consider whether the plan has a significant adverse impact on an identifiable political group, whether the plan has objective indicia of irregularity, and then, whether the State is able to produce convincing evidence that the plan nevertheless serves neutral, legitimate interests of the community as a whole." Under Justice Souter's standard, after the plaintiffs met their prima facie case, Justice Souter "would then shift the burden to the defendants to justify their decision by reference to objectives other than naked partisan advantage." Vieth, 541 U.S. at 351 (Souter J., dissenting).

Neither Justice suggested that the defendants should be required to show that a plan was "unavoidable" in light of traditional districting criteria. In fact, under Justice Souter's test, the plaintiffs would have to show as part of their prima

facie case both that the legislature "paid little or no heed to those traditional districting principles whose disregard can be shown straightforwardly" and that the legislature could have drawn a fairer plan that "deviated less from traditional districting principles." Vieth, 541 U.S. at 348 (Souter, J., dissenting). See also LULAC, 548 U.S. at 491 (Breyer, J., concurring in part and dissenting in part) (including evidence of "a radical departure from traditional boundary-drawing criteria" as part of plaintiffs' prima facie case).

The equal apportionment cases plaintiffs cite are similar. After a plaintiff challenging population disparities in state legislative districts establishes her prima facie case, the burden shifts to the defendants to show that their plan is "justified." Brown, 462 U.S. at 843. In particular, the question is "whether the legislature's plan 'may reasonably be said to advance [a] rational state policy.'" Id. (quoting Mahan v. Howell, 410 U.S. 315, 328 (1973)). Again, there is no requirement to show that the plan was "unavoidable."

Plaintiffs' proposed standard seems to be most similar to the one that applies to equal apportionment requirements in *congressional* redistricting. In those cases, if the plaintiffs meet their prima facie case, "the burden shifts to the State to 'show with some specificity' that the population differences 'were *necessary* to achieve some legitimate state objective.'" Tennant v. Jefferson County Commission, 133 S. Ct.

3, 5 (2012) (quoting Karcher, 462 U.S. at 740-41) (emphasis added). However, the Supreme Court has expressly declined to adopt the "necessity" standard in the context of state legislative districting because the two types of challenges are governed by different constitutional provisions, Article I, § 2 (with respect to congressional districts) and the equal protection clause (with respect to state legislative districts). Mahan, 410 U.S. at 321 ("[M]ore flexibility [i]s constitutionally permissible with respect to state legislative reapportionment than in congressional redistricting."). Because plaintiffs in this case are relying on the equal protection clause rather than Article I, § 2, the more lenient standard is more instructive.

Further, even with respect to congressional districts, the plaintiffs are required to show as part of their prima facie case that "the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." Karcher, 462 U.S. at 730. Under their proposed test, plaintiffs have no burden to show that defendants could have drafted a better plan.

In sum, we believe that plaintiffs have overstated defendants' burden in part three of their proposed test. However, this conclusion does not require summary judgment in defendants' favor. As noted above, defendants have made no effort to justify the plan using neutral criteria. Thus, to the extent that

defendants have any burden to prove the legitimacy of the plan, this element must be resolved at trial. Further, to the extent that plaintiffs have an initial burden to show that defendants' plan cannot be justified using neutral criteria, we believe that plaintiffs have met that burden for the purpose of defendants' motion for summary judgment by drafting a plan with a dramatically lower efficiency gap while still satisfying neutral criteria.

Again, because the parties have not fully briefed the question of how this element should be formulated, it would be premature to answer the question in this order. At trial, both sides should be prepared to submit whatever evidence they have to show whether Act 43 can be justified by neutral criteria.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Gerald C. Nichol, Thomas Barland, John Franke, Harold V. Froehlich, Elsa Lamelas, Timothy Vocke and Kevin J. Kennedy, dkt. #45, is DENIED.

2. The motion filed by plaintiffs William Whitford, Roger Anclam, Emily Bunting, Mary Lynne Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, James Seaton, Allison Seaton, Jerome Wallace and Don Winter to exclude the opinions of Sean Trende, dkt. #70, is DENIED WITHOUT PREJUDICE to plaintiffs' refiling it at the conclusion of trial.

3. Trial will begin on Tuesday, May, 24, 2016 and should be completed by Friday, May 27, 2016. If the parties believe that is not a sufficient amount of time, they should explain their concerns in writing no later than April 18, 2016.

Entered this 7th day of April, 2016.

BY THE COURT:

/s/

KENNETH F. RIPPLE
Circuit Judge

/s/

BARBARA B. CRABB
District Judge

/s/

WILLIAM C.
GRIESBACH
District Judge

Cross-Reference to Supplemental Appendix

Amended Rebuttal Report: Response to Expert Reports of Sean Trende and Nicholas Goedert, Dr. Kenneth R. Mayer (ECF No. 95) appears at: SA282–314

Joint Final Pre-Trial Report

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, ROGER ANCLAM, EMILY BUNTING, MARY LYNNE DONOHUE, HELEN HARRIS, WAYNE JENSEN, WENDY SUE JOHNSON, JANET MITCHELL, ALLISON SEATON, JAMES SEATON, JEROME WALLACE, and DONALD WINTER,	)	No. 15-cv-421-bbc
Plaintiffs,	)	
v.	)	
GERALD C. NICHOL, THOMAS BARLAND, JOHN FRANKE, HAROLD V. FROEHLICH, KEVIN J. KENNEDY, ELSA LAMELAS, and TIMOTHY VOCKE,	)	
Defendants.	)	

JOINT FINAL PRETRIAL REPORT

This action for declaratory relief challenges 2011 Wisconsin Act 43, which adopted new boundaries for the state's legislative districts, and codified them in Chapter 4 of the Wisconsin Statutes. The case is scheduled for trial commencing Tuesday, May 24, 2016 and is expected to last four days. In accordance with the Court's October 15, 2015 Scheduling Order (Dkt. 33) and Civil L.R. 16(c)(1), the parties, through their respective counsel, submit the following pre-trial report.

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JOINT STATEMENT OF STIPULATED FACTS

Plaintiffs

1. Plaintiffs are qualified, registered voters in the State of Wisconsin, who reside in various counties and legislative districts.

2. Plaintiffs are all supporters of the Democratic party and of Democratic candidates, and they almost always vote for Democratic candidates in Wisconsin elections.

3. Plaintiff William Whitford, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 76th Assembly District in Madison, in Dane County, Wisconsin.

4. Plaintiff Roger Anclam, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 31st Assembly District in Beloit, in Rock County, Wisconsin.

5. Plaintiff Emily Bunting, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 49th Assembly District in Viola, Richland County, Wisconsin.

6. Plaintiff Mary Lynne Donohue, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 26th Assembly District in Sheboygan, in Sheboygan County, Wisconsin.

7. Plaintiff Helen Harris, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 22nd Assembly District in Milwaukee, in Milwaukee County, Wisconsin.

8. Plaintiff Wayne Jensen, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 63rd Assembly District in Rochester, in Racine County, Wisconsin.

9. Plaintiff Wendy Sue Johnson, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 91st Assembly District in Eau Claire, in Eau Claire County, Wisconsin.

10. Plaintiff Janet Mitchell, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 66th Assembly District in Racine, in Racine County, Wisconsin.

11. Plaintiffs James and Allison Seaton, citizens of the United States and of the State of Wisconsin, are residents and registered voters in the

42nd Assembly District in Lodi, in Columbia County, Wisconsin.

12. Plaintiff Jerome Wallace, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 23rd Assembly District, in Fox Point, in Milwaukee County, Wisconsin.

13. Plaintiff Don Winter, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 55th Assembly District in Neenah, in Winnebago County, Wisconsin.

Defendants

14. Defendant Gerald C. Nichol is the Chair of the Wisconsin Government Accountability Board ("G.A.B."), and is named solely in his official capacity as such. The G.A.B. is a state agency under Wis. Stat. § 15.60, which has "general authority" over and "responsibility for the administration of . . . [the State's] laws relating to elections and election campaigns," Wis. Stat. § 5.05(1), including the election every two years of Wisconsin's representatives in the Assembly.

15. Defendants Thomas Barland, John Franke, Harold V. Froehlich, Elsa Lamelas, and Timothy Vocke are all members of the G.A.B., and are named solely in their respective official capacities as such.

16. Defendant Kevin J. Kennedy is the Director and General Counsel of the G.A.B., and is named solely in his official capacity as such.

The Redistricting Process in 2011

17. In 2011, Adam Foltz was a legislative aide to the Republican then-Speaker of the Wisconsin Assembly.

18. In 2011, Tad Ottman was a legislative aide to Republican Majority Leader of the Wisconsin Senate.

19. In 2011, Adam Foltz and Tad Ottman worked with consultants, including Joseph Handrick and Professor Keith Gaddie, as well as others, to develop a redistricting plan for Wisconsin's legislative districts.

20. In January 2011, Scott Fitzgerald, Republican member of the Wisconsin State Senate and Wisconsin Senate Majority Leader, and Jeff Fitzgerald, Republican member of the Wisconsin State Assembly and Speaker of the Assembly, hired attorney Eric McLæod ("McLæod") and the law firm of Michael Best to represent the entire Wisconsin State Senate and Wisconsin State Assembly in connection with the reapportionment of the state legislative districts after the 2010 Census.

21. On January 3, 2011, the Committee on Senate Organization approved the following motion with all three Republican members of the Committee (Senator Scott Fitzgerald, Senator Michael Ellis, and Senator Glenn Grothman) voting "Aye" and the single Democrat member (Senator Mark Miller) voting "No":

> *[MOTION] To authorize the hiring of the law firms of Michael Best & Friedrich, LLP and Troupis Law Office, LLC for services related to redistricting of legislative and congressional districts for the 2012 elections. The law firms shall perform work at the direction of the Majority Leader. This authorization includes the authority to provide the law firms with any redistricting software applications procured or developed by the Legislature that are necessary to facilitate participation in the redistricting drafting process. Upon adoption of this motion, the retention of the law firm of O'Neil, Cannon, Hollman, DeJong, S.C. is terminated. The Chief Clerk may pay the law firm of O'Neil, Cannon, Hollman, DeJong, S.C. for services rendered through the date on which this ballot is adopted but not for services rendered on any date thereafter."* [The Motion/Ballot was part of the record in Baldus (2:11-cv-00562-JPS-DPW-RMD, filed 12/16/11 Doc. 81-2) and is subject to judicial notice pursuant to FRE Rule 201(b)(2)].

22. On January 4, 2011, the Assembly Organization Committee approved the following motion to:

> *"Authorize the Speaker of the Assembly, Jeff Fitzgerald, to retain legal counsel for the purpose of apportioning and redistricting the Legislative and Congressional Districts following the 2010 decennial Census as required by Article IV, Section 3 of the Wisconsin Constitution. Such counsel will be compensated under s. 20.765(1)(a)."* [The Motion was part of the record in Baldus (2:11-cv-00562-JPS-DPW-RMD, filed 12/16/11 Doc. 81-3) and is subject to judicial notice pursuant to FRE Rule 201(b)(2)].

23. All redistricting work was done in Michael Best's office before the file (the redistricting plan that became Act 43) was sent to the Legislative Reference Bureau for drafting, and the "map room" where all redistricting work was done was located in Michael Best's office.

24. A formal written policy provided that only the Senate Majority Leader, the Speaker of the House, and their aides Tad Ottman and Adam Foltz, and Michael Best attorney Eric Mcleod and legal staff designated by Mr. McLeod, would have unlimited access to the "map room."

25. The access policy provided for limited access by rank and file legislators:

> "*Legislators will be allowed into the office [mapping room] for the sole purpose of looking at and discussing their district. They are only to be present when an All Access member is present. No statewide or regional printouts will be on display while they are present (with the exception of existing districts). They will be asked at each visit to sign an agreement that the meeting they are attending is confidential and they are not to discuss it.*" But only Republican legislators were allowed even this limited access.

26. Three computers were deployed by the Legislative Technology Services Bureau ("LTSB") to the "map room" at Michael Best & Friedrich for use in drafting the redistricting plan. Each computer contained two mirrored internal hard drives and one external hard drive. On July 15, 2010, a computer coded for identification purposes as WRK32587 was deployed to Michael Best & Friedrich for use by Tad Ottman. Computer WRK32587 was deployed with an external hard drive with the identification code of HDD32575. On June 4, 2012, computer WRK32587 was moved from Michael Best & Friedrich to the legislative office of Senator Scott Fitzgerald in the Capitol Building. On May 21, 2015, the hard drives from computer WRK32587 and its external hard drive HDD32575 were shredded pursuant to the

established policy and procedures for disposal established by the LTSB. Ylvisaker Dep. (Dkt. 106), at 14:18- 15:12, 23:7-26:17, 28:7-31:17; Ex. 49, Ex. 50 at 12.

27. Also on July 15, 2010, a computer coded WRK32586 was deployed to Michael Best & Friedrich for use by Adam Foltz. Computer WRK32586 was deployed with an external hard drive with the identification code of HDD32574. On September 13, 2012, computer WRK32586 was returned to the LTSB. On May 21, 2015, the hard drives from computer WRK32586 and its external hard drive HDD32574 were shredded pursuant to the established policy and procedures for disposal established by the LTSB. Ylvisaker Dep. (Dkt. 106), at 14:18- 15:12, 23:7-26:17, 28:7-31:17; Ex. 49, Ex.50 at 12.

28. On March 21, 2011, a third computer coded WRK32864 was deployed to Michael Best & Friedrich for use by Joseph Handrick. Computer WRK32864 was deployed with an external hard drive with the identification code of HDD32579. On June 4, 2012, computer WRK32864 was moved from Michael Best & Friedrich to the legislative office of Senator Scott Fitzgerald in the Capitol Building. On May 21, 2015, the hard drives from computer WRK32864 and its external hard drive HDD32579 were shredded pursuant to the established policy and procedures for disposal established by the LTSB. Ylvisaker Dep.

(Dkt. 106), at 14:18- 15:12, 23:7-26:17, 28:7-31:17; Ex. 49, Ex. 50 at 12.

29. In the course of drafting the redistricting plan enacted by Act 43 (the Current Plan) for Wisconsin's legislative districts, Adam Foltz, Tad Ottman, and Keith Gaddie examined the past partisan performance of voters in the existing legislative districts, as well as the expected future partisan performance of voters in various configurations of potential new districts.

30. Specifically, in the course of developing the Current Plan for Wisconsin's legislative districts, Adam Foltz, Tad Ottman, and Keith Gaddie examined whether past districts were likely to vote majority Republican or majority Democratic, and whether various configurations of potential new districts were likely to vote majority Republican or majority Democratic.

31. On April 11, 2011, Professor Ronald Keith Gaddie entered into a Consulting Services Agreement with Michael Best & Friedrich. The agreement stated that Professor Gaddie was to serve as a consultant to Michael Best & Friedrich in connection with its representation of the Wisconsin State Senate and the Wisconsin State Assembly on "*matters relating to the reapportionment of the Wisconsin Senate, Assembly and Congressional Districts arising out of the 2010 census.*" The agreement described Professor Gaddie's "*duties*" as including "*service as an independent*

advisor on the appropriate racial and/or political make-up of legislative and congressional districts in Wisconsin," and would include "*providing advice based on certain statistical and demographic information and on election data or information.*" Additionally, the Consulting Services Agreement stated, "*Any work papers or materials prepared by you, or under your direction, belong to the Senate pursuant to the Representation, and every page must be sealed or otherwise stamped "Attorney/Client Work-Product Privilege Confidential."*

32. On April 17, 2011, Keith Gaddie drafted a note to himself while he was in Madison, Wisconsin, providing consulting services for the development of a redistricting plan. The document stated in full:

> "*The measure of partisanship should exist to establish the change in the partisan balance of the district. We are not in court this time; we do not need to show that we have created a fair, balanced, or even a reactive map. But, we do need to show to lawmakers the political potential of the district.*
>
> *I have gone through the electoral data for state office and built a partisan score for the assembly districts. It is based on a regression analysis of the Assembly vote from 2006, 2008, and 2010, and it is based on prior election indicators of future election performance.*

I am also building a series of visual aides to demonstrate the partisan structure of Wisconsin politics. The graphs will communicate the top-to-bottom party basis of the state politics. It is evident, from the recent Supreme Court race and also the Milwaukee County executive contest, that the partisanship of Wisconsin is invading the ostensibly non-partisan races on the ballot this year." Gaddie Dep. (Dkt. 108), at 95: 6-96:2.

33. On March 9, 2016, during his deposition, Keith Gaddie was asked the following question:

> "*Q: You said something to the effect that is important to understand the partisan effect. Why is it important to understand the partisan effect?*"

Professor Gaddie responded to that question:

> "*A: Well, again, I was writing as a political scientist. If you're going to redistrict it's important to understand the consequences of it. Lawmakers are going to be concerned about a variety of different consequences of a redistricting. The impact on their constituency, the impact on other constituencies.*
>
> *If a lawmaker comes in and wants to know what you did to his district, it would be nice to be able to tell him we've got an estimate of what your district*

used to look like in terms of partisanship and here's what it looks like now. So this kind of technique allows us to generate a measure that you can show to somebody and explain to them, this is what we think the net electoral impact is on your constituency.

In the aggregate, it means you can look at an entire map and ascertain the extent to which you have moved the partisan balance one way or the other."

Gaddie Dep. (Dkt. 108), at 98:24-99:24.

"Q: And you use the word "potential" there. What did you mean by the word potential?

A: If you had an election in the future, how might it turn out. So when I say potential, what I'm saying is that if we ran an election, this is our best estimate of what a non-incumbent election would look like given a particular set of circumstances, depending on whether one party is stronger or weaker.

Q. And that's what your regression model was designed to do, to show that potential of the district?

A. Yeah, it was designed to tease out a potential estimated vote for the legislator in the district and then allow you to also look at that and say, okay, what if the Democrats have a good year? What if

the Republicans have a good year? How does it shift? Okay?

The other thing is we know that districts don't correspond precisely to our statistical models all the time. So we're not concerned just with the crafting of the district or a point estimate of the vote. It's only an estimate. There's error. Right? There's going to be a range within which the outcome might occur.

The idea was to give to those people that were mapping, those people that were making choices, as much knowledge as we could glean about each district by giving them the most leverage on the least amount of data." Gaddie Dep. (Dkt. 108) at 100:22 -102:3.

34. On March 9, 2016, during his deposition, Keith Gaddie was asked the following question:

"*Q: But a significant part of your work that you were retained to do and that you did perform in 2011 had to do with the – with building a regression model to be able to test the partisan makeup and performance of districts as they might be configured in different ways, correct?*"

Professor Gaddie responded to that question:

A: "Yes, that's correct."

Gaddie Dep. (Dkt. 108) at 46:12-19.

35. Professor Gaddie identified two measures to estimate the partisan change that would occur due to redistricting:

> *"There are basically two ways you can measure or you can estimate a partisan change when you redistrict. One is to use what's called a reconstituted election technique where we take either one or an index with several statewide elections, exongenous elections, which are elections that occur outside a district. Right? Higher levels of office. And we attempt to get a sense of a partisan average from that.*
>
> *Or what you can do is you can take the actual election results, okay, the actual outcomes of previous elections, you turn those into a dependent variable, an outcome of interest, and then you regress using linear regression those results on these larger statewide measures.*
>
> *The other thing you do is you attempt to take into account whether or not there's an incumbent running so that you can account for the incumbency impact. Again, it's been four years since I did this. But what we did is I had proposed to the map drawers that if they wanted to present a best estimate of partisan impact so the lawmakers can understand the consequence of different maps, that a regressions driven technique is the best*

approach. So I set about building a regression equation using data that should have been produced to generate estimates of partisanship, partisan behavior in those districts for different district proposals.

So what this – what this spreadsheet is, is the consequence of applying one of those models. If it is what I think it is, it's the consequence of applying one of those models to a map generated by a map maker where what we know is, we know the statewide election results, and we then put those data for each district into the regression equation and that gives us an estimated vote value for each district. And that's what reported here, assuming no incumbent.

Gaddie Dep. (Dkt. 108) at 43:16-45:8.

36. "joe base map numbers.xlsx" is a document saved on the disc, Amended Lanterman Decl., Ex. B (Dkt. 97-2), and located in the "WRK32864 Responsive Spreadsheets Deduplicated file," and is a true and correct copy of a spreadsheet found by Mark Lanterman on the computer deployed to Michael Best & Friedrich for use by Joseph Handrick. Amended Lanterman Decl., Ex. B (Dkt. 97-2).

37. The metadata for "joe base map numbers" is shown here:

File Name	joe base map numbers.xlsx
Extension	xlsx
Created (Central)	4/11/2011 5:09:21 PM (2011-04-11 22:09:21 UTC)
Accessed (Central)	5/12/2011 7:06:05 PM (2011-05-13 00:06:05 UTC)
Modified (Central)	5/12/2011 7:06:05 PM (2011-05-13 00:06:05 UTC)
File Path	/Users/tad/Documents/joe base map numbers.xlsx
File Size	22.91 KB
Author	tad
Last Saved By	tad
Office Created Date	4/11/2011 4:35:26 PM (2011-04-11 21:35:26 UTC)
Office Last Printed Date	5/12/2011 7:04:21 PM (2011-05-13 00:04:21 UTC)
Office Last Saved Date	5/12/2011 7:06:05 PM (2011-05-13 00:06:05 UTC)
Hidden Columns or Rows	FALSE
Track Changes	FALSE
MD5 Hash Value	9697f259cb6de2e7e838a4de973f2481

Amended Lanterman Decl., Ex. B (Dkt. 97-2), "WRK32684 Responsive Spreadsheets File Detail Report."

38. The "joe base map numbers" spreadsheet lists district-by-district partisanship scores developed by Handrick, Foltz, and Ottman. Gaddie Dep. (Dkt. 108) at 40:12-24, 223:7-12.

39. The "joe base map numbers" spreadsheet lists district-by-district partisan scores for three Assembly district plans: the "current map," "basemap BASIC," and "basemap assertive." Amended Lanterman Decl., Ex. B (Dkt. 97-2), "WRK32864 Responsive Spreadsheets Deduplicated file."

40. "TADOTTMANSUPPPROD000094" is a true and correct copy of a spreadsheet created by Tad Ottman in 2011 and produced to the Court as part of the Legislature's supplemental production in *Baldus v. Brennan* (2:11-cv-00562-JPS-DPW-RMD; dated January 10, 2012).

41. "TADOTTMANSUPPPROD000094" lists district-by-district partisan scores developed by Handrick, Foltz, and Ottman. Gaddie Dep. (Dkt. 108) at 40:12-24, 223:7-12.

42. "TADOTTMANSUPPPROD000097" is a true and correct copy of a spreadsheet created by Tad Ottman in 2011 and produced to the Court as part of the Legislature's supplemental production in *Baldus v. Brennan* (2:11-cv-00562-JPS-DPW-RMD; dated January 10, 2012).

43. "TADOTTMANSUPPPROD000097" lists district-by-district partisan scores developed by Handrick, Foltz, and Ottman. Gaddie Dep. (Dkt. 108) at 40:12-24, 223:7-12.

44. "Plancomparisons.xlsm," a document saved on the disc, Amended Lanterman Decl., Ex. B (Dkt. 97-2), and located in the WRK32864 Responsive Spreadsheets Deduplicated file, is a true and correct copy of a spreadsheet found by Mark Lanterman on the computer deployed to Michael Best & Friedrich for use by Joseph Handrick.

45. The metadata for "PlanComparisons" is shown here:

File Name	PlanComparisons.xlsm
Extension	xlsm
Created (Central)	5/13/2011 12:58:51 PM (2011-05-13 17:58:51 UTC)
Accessed (Central)	7/14/2011 1:32:51 PM (2011-07-14 18:32:51 UTC)
Modified (Central)	7/14/2011 1:32:51 PM (2011-07-14 18:32:51 UTC)
File Path	/Users/tad/Desktop/PlanComparisons.xlsm
File Size	69.10 KB
Author	afoltz
Last Saved By	tad

Office Created Date	5/2/2011 6:13:18 PM (2011-05-02 23:13:18 UTC)
Office Last Printed Date	6/15/2011 3:28:17 PM (2011-06-15 20:28:17 UTC)
Office Last Saved Date	7/14/2011 1:32:51 PM (2011-07-14 18:32:51 UTC)
Hidden Columns or Rows	FALSE
Track Changes	FALSE
MD5 Hash Value	8d0b9118f01010be5b553b0306e6003 7

Amended Lanterman Decl., Ex. B (Dkt. 97-2), "WRK32684 Responsive Spreadsheets File Detail Report."

46. The "PlanComparisons" spreadsheet lists district-by-district partisan scores developed by Handrick, Foltz, and Ottman. Gaddie Dep. (Dkt. 108) at 40:12-24, 223:7-12.

47. The "PlanComparisons" spreadsheet lists district-by-district partisan proxy scores for four Assembly district plans: each tab includes an

identical column for a "Current" plan, and there are three tabs labeled as "Joe Aggressive," "Joe Aggressive (2)," and "TeamMap 6-15-11." Amended Lanterman Decl., Ex. B (Dkt. 97-2), "WRK32864 Responsive Spreadsheets Deduplicated file." Gaddie Dep. (Dkt. 108) at 215:22-217-20.

48. A spreadsheet labeled "Final Map" is a true and correct copy of a spreadsheet created by Adam Foltz. Gaddie Dep. (Dkt. 108), Ex. 39 at 3; Foltz. Dep. (Dkt 109) at 128:14-16.

49. The metadata associated with the "Final Map" is written on Exhibit 39, as follows:

> "Plan Comparisons.xlsm"
>
> created 5/9/11 5:39 PM
>
> accessed 4/27/12 4:50 PM
>
> modified 4/27/12 4:50 PM
>
> file path: /users/afoltz/Desktop/projects/PlanComparisons.xlsm

Gaddie Dep. (Dkt. 108), Ex. 39 at 1; Amended Lanterman Decl., Ex. B (Dkt. 97-2).

50. The "Final Map" spreadsheet lists district-by-district partisan scores developed by Handrick,

Foltz, and Ottman. Gaddie Dep. (Dkt. 108) at 40:12-24, 223:7-12.

51. The spreadsheets shown in "joe base map numbers," "PlanComparisons," "TADOTTMANSUPPPROD000094," "TADOTTMANSUPPPROD000097," and "Final Map" all include district-by-district partisan scores for both the "current map" and a different version of a potential future plan. Gaddie Dep. (Dkt. 108) at 220:25-221:13.

52. The "current map" referred to in "joe base map numbers," "PlanComparisons," "TADOTTMANSUPPPROD000094," "TADOTTMANSUPPPROD000097," and "Final Map," denotes the existing map, the maps as constituted in the State of Wisconsin before the 2012 re- map. Gaddie Dep. (Dkt. 108) at 234:22-24.

53. The district-by-district partisan scores for the "Current map" column in "joe base map numbers," and the "Current" column for the Assembly in "PlanComparisons," "TADOTTMANSUPPPROD000094," "TADOTTMANSUPPPROD000097," and "Final Map" are identical for all 99 districts.

54. "joe base map" is a document saved on the disc, Amended Lanterman Decl., Ex. B (Dkt. 97-2), and located in the WRK32864 Responsive Spreadsheets Deduplicated file, and is a true and

correct copy of a spreadsheet found by Mark Lanterman on the computer deployed to Michael Best & Friedrich for use by Joseph Handrick. Amended Lanterman Decl., Ex. B (Dkt. 97-2).

55. The district-by-district partisan scores for the "base map BASIC" columns (columns F and P) in "joe base map numbers" are identical to the district-by-district partisan scores listed in the column "ALL0410" (column AU) in "joe base map."

56. "Final Map" was "probably the final map," and at minimum, "it's a safe assumption that [the map is] very near the completion of the process." Foltz Dep. (Dkt. 113) at 140:6-11, referring to Gaddie Dep. (Dkt. 108), Ex 39 at 3.

57. Professor Gaddie produced "S-curves" for draft Assembly redistricting plans prepared by Adam Foltz, Tad Ottman, and Joe Handrick. Gaddie Dep. (Dkt. 108) at 126:2-10.

58. Professor Gaddie agreed "with Joe Handrick to provide these types of spreadsheets to Adam Foltz, to himself and Adam Foltz and Tad Ottman, for the legislature in the drafting process. So one thing we do, they would create a map, then there would be part – there's electoral history data attached to it. Those data were used to generate spreadsheets of this sort that indicated how a district would perform on a partisan measure under different scenarios." Gaddie Dep. (Dkt. 108) at 40:14-24.

59. S-curves show "based upon an expected statewide vote for one party of the other which seats are going to tend more Democratic shaded in blue, more Republican shaded in red. Light blue means that they're Democratic tending, but competitive. Orange means they're Republican tending but competitive." Gaddie Dep. (Dkt. 108) at 128:10-16.

60. S-curves show "as you move the value of the vote for one party either up or down, you can see the responsiveness of the districts and how they shift and the number of seats that come into play for one party or fall away." Gaddie Dep. (Dkt. 108) at 129:6-11.

61. S-curves provide "a visualization of both the distribution of partisanship in the districts and the sensitivity of individual districts to changes and partisan strength across the state, assuming that the entire state shifts in the same direction one way or the other." Gaddie Dep. (Dkt. 108) at 129:12-18.

62. "Composite_Current_Curve.xlsx" is located in the WRK32586 Responsive Spreadsheets Deduplicated file, and is a true and correct copy of an "S-Curve" found by Mark Lanterman on the computer deployed to Michael Best & Friedrich for use by Adam Foltz. Amended Lanterman Decl., Ex. B (Dkt. 97-2).

63. The metadata for "Composite_Current_Curve" is as follows:

File Name	Composite_Current_Curve.xlsx
Extension	Xlsx
Created (Central)	5/28/2011 12:03:01 PM (2011-05-28 17:03:01 UTC)
Accessed (Central)	6/1/2011 11:48:33 AM (2011-06-01 16:48:33 UTC)
Modified (Central)	6/1/2011 11:48:33 AM (2011-06-01 16:48:33 UTC)
File Path	/Users/afoltz/Desktop/Projects/Composite_Current_Curve.xlsx
File Size	447.98 KB
Author	Ronald Keith Gaddie
Last Saved By	Afoltz
Office Created Date	5/28/2011 8:12:17 AM (2011-05-28 13:12:17 UTC)
Office Last Printed Date	6/1/2011 10:46:26 AM (2011-06-01 15:46:26 UTC)
Office Last Saved Date	6/1/2011 11:48:33 AM (2011-06-01 16:48:33 UTC)
Hidden Columns or Rows	FALSE
Track Changes	FALSE
MD5 Hash Value	2acd25783c0be60bbe563ab324024556

Amended Lanterman Decl., Ex. B (Dkt. 97-2), "WRK32586 Responsive Spreadsheets File Detail Report."

64. In "Composite_Current_Curve," the total number of seats for which Republicans have a baseline over 50%, using Professor Gaddie's regression model, for statewide Republican vote shares between 46% and 52% is as follows:

46%	47%	48%	49%	50%	51%	52%
36	42	46	53	58	62	64

Amended Lanterman Decl., Ex. B (Dkt. 97-2).

65. "Composite_Joe_Assertive_Curve.xlsx" is located in the WRK32586 Responsive Spreadsheets Deduplicated file, and is a true and correct copy of an "S-Curve" found by Mark Lanterman on the computer deployed to Michael Best & Friedrich for use by Adam Foltz. Amended Lanterman Decl., Ex. B (Dkt. 97-2).

66. The metadata for "Composite_Joe_Assertive_Curve" is as follows:

File Name	Composite_Joe_Assertive_Curve.xlsx
Extension	Xlsx
Created (Central)	5/28/2011 12:03:01 PM (2011-05-28 17:03:01 UTC)
Accessed (Central)	5/28/2011 12:49:55 PM (2011-05-28 17:49:55 UTC)

Modified (Central)	5/28/2011 12:49:56 PM (2011-05-28 17:49:56 UTC)
File Path	/Users/afoltz/Desktop/Projects/Composite_Joe_Assertive_Curve.xlsx
File Size	440.42 KB
Author	Ronald Keith Gaddie
Last Saved By	Afoltz
Office Created Date	5/28/2011 8:12:17 AM (2011-05-28 13:12:17 UTC)
Office Last Printed Date	
Office Last Saved Date	5/28/2011 12:49:56 PM (2011-05-28 17:49:56 UTC)
Hidden Columns or Rows	FALSE
Track Changes	FALSE
MD5 Hash Value	4a25a4cc8403f9c9ffb61b1eb0bb0de5

Amended Lanterman Decl., Ex. B (Dkt. 97-2), "WRK32586 Responsive Spreadsheets File Detail Report."

67. In "Composite_Joe_Assertive_Curve," the total number of seats for which Republicans have a baseline over 50%, using Professor Gaddie's regression model, for statewide Republican vote shares between 46% and 52% is as follows:

46%	47%	48%	49%	50%	51%	52%
44	50	55	58	60	62	63

Amended Lanterman Decl., Ex. B (Dkt. 97-2).

68. "Team_Map_Curve.xlsx" is located in the WRK32586 Responsive Spreadsheets Deduplicated file, and is a true and correct copy of an "S-Curve" found by Mark Lanterman on the computer deployed to Michael Best & Friedrich for use by Adam Foltz. Amended Lanterman Decl., Ex. B (Dkt. 97-2).

69. The metadata for "Team_Map_Curve" is as follows:

File Name	Team_Map_Curve.xlsx
Extension	Xlsx
Created (Central)	6/14/2011 1:56:03 PM (2011-06-14 18:56:03 UTC)
Accessed (Central)	6/14/2011 1:56:03 PM (2011-06-14 18:56:03 UTC)
Modified (Central)	6/14/2011 1:56:03 PM (2011-06-14 18:56:03 UTC)

File Path	/Users/afoltz/Desktop/Projects/Team_Map_Curve.xlsx
File Size	35.70 KB
Author	Ronald Keith Gaddie
Last Saved By	Afoltz
Office Created Date	6/14/2011 12:06:15 PM (2011-06-14 17:06:15 UTC)
Office Last Printed Date	6/14/2011 1:47:35 PM (2011-06-14 18:47:35 UTC)
Office Last Saved Date	6/14/2011 1:56:03 PM (2011-06-14 18:56:03 UTC)
Hidden Columns or Rows	FALSE
Track Changes	FALSE
MD5 Hash Value	5a79df0e25b95605c14ca7824dbb8614

Amended Lanterman Decl., Ex. B (Dkt. 97-2), "WRK32586 Responsive Spreadsheets File Detail Report."

70. In "Team_Map_Curve," the total number of seats for which Republicans have a baseline over 50%,

using Professor Gaddie's regression model, for statewide Republican vote shares between 46% and 52% is as follows:

46%	47%	48%	49%	50%	51%	52%
46	50	54	56	58	60	64

71. On March 9, 2016, during his deposition, Keith Gaddie was asked the following question:

> *Q. Is the Team Map Curve a more pro Republican map than a pro Democrat map?*

Professor Gaddie responded to that question:

> *A. Let me look at it for a minute. Okay. At 50% of the expected vote statewide, of the 99 assembly districts it appears that 55 of them are either safely or leaning Republican with 21 of those seats being competitive Republican districts. At 53% Republican statewide vote of the 99 assembly districts, 46 of them appear to be districts that we would term safely Republican based upon the estimate. So there is a Republican lean in this map, yes.*

Gaddie Dep. (Dkt. 108) at 167:6-17.

72. No Democrats participated in the drafting process that led to the creation of the redistricting plan that was enacted in Act 43.

73. Prior to the legislative introduction of Act 43, no Democrat was given an opportunity to see the boundaries of any legislative districts in the proposed map.

74. Prior to the legislative introduction of Act 43, Republican legislators who had not been involved in drafting the plan were allowed to see the boundaries of their own district, but were not allowed to see the boundaries of any other district in the map.

75. Prior to the passage of Act 43, when Republican legislators were shown the boundaries of what would be their new legislative district, they were given information about the expected partisan voting patterns in the district, i.e., what percentage of voters were likely to vote for a Republican candidate and what percentage of voters were likely to vote for a Democratic candidate.

76. Under the direction and supervision of Eric McLeod, Tad Ottman met with 17 Republican members of the Wisconsin State Senate, identified in Exhibit 4 attached to the Complaint. Each of the 17 Republican Senators signed a secrecy agreement entitled "*Confidentiality and Nondisclosure Related to Reapportionment*" before being allowed to review and discuss their districts.

77. The secrecy agreement stated that Eric McLeod had "instructed" Tad Ottman to meet with certain members of the Senate to discuss the reapportionment process and characterized such conversations as privileged communications pursuant to the attorney-client and attorney work product privileges.

78. Under the supervision of Eric McLeod, Adam Foltz met with 58 Republican members of the Wisconsin State Assembly, identified in Exhibit 4 attached to the Complaint. Each of the 58 Republican Representatives signed a secrecy agreement entitled "Confidentiality and Nondisclosure Related to Reapportionment" before being allowed to review and discuss their districts, which also improperly described their conversations as privileged.

79. After each of the 58 Republican members of the Wisconsin State Assembly signed the secrecy agreement entitled "*Confidentiality and Nondisclosure Related to Reapportionment,*" they gave it to Adam Foltz and none kept a copy for themselves. Foltz Dep. (Dkt. 110) at 357:16 -358:3.

80. Robin Vos participated in each of the meetings that Adam Foltz had with each of the 58 Republican members of the Wisconsin State Assembly listed in Exhibit 4 of the Complaint. Foltz Dep. (Dkt. 110) at 263:6-265:5.

81. Exhibit 100 to the deposition of Adam Foltz, dated 2/1/12, is an authentic copy (within the meaning of Fed. Evid. Rule 901(a)) of a one-page memo addressed to Representative Garey Bies from Adam Foltz, dated June 19, 2011, with copies to Speaker Jeff Fitzgerald, Majority Leader Scott Suder, and Representative Robin Vos, which is captioned "*New Map for the 1st District*" and which had attached to it a map of the new 1st Assembly District that became part of Act 43. The information contained in the memo identified the partisan performance of the new 1st Assembly District based on data from five prior elections (Scott Walker in 2010, J.B. Van Hollen in 2010, John McCain in 2008, J.B. Van Hollen in 2008, and George W. Bush in 2004). Similar one-page memos with analogous partisan performance data with attached copies of the member's new district were sent to each of the 58 Republican members of the Wisconsin State Assembly on the same date, June 19, 2011. Foltz Dep. (Dkt.110) at 266:10-267:15.

82. Exhibit 113 to the deposition of Adam Foltz, dated 2/1/12, is an authentic copy (within the meaning of Fed. Evid. Rule 901(a)) of a one-page memo created by Adam Foltz on June 20, 2011, at 12:34 p.m., and which was last saved on Adam Foltz's computer on July 7, 2011, at 2:40 p.m. and was a WORD document captioned "*General Talking Points for Robin.*" Foltz Dep. (Dkt.110) at 337:6-16, 347:22-351:4.

83. Exhibit 114 to the deposition of Adam Foltz, dated 2/1/12, is an authentic copy (within the meaning of Fed. Evid. Rule 901(a)) of a printout of the metadata associated with Exhibit 113 to the same deposition, which was a WORD document created on June 20, 2011, at 12:34 p.m. and which was last saved on Adam Foltz's computer on July 7, 2011, at 2:40 p.m. Foltz Dep. (Dkt.110) at 337:6-16, 347:22-351:4.

84. In *Baldus v. Wisconsin Government Accountability Board*, 843 F. Supp. 2d 955, 959 (E.D. Wis. 2012), the Court held that the Legislature improperly asserted attorney-client and work product privileges to prevent discovery of information regarding the redistricting process.

85. On July 11, 2011, the Current Plan was introduced by the Committee on Senate Organization without any Democratic members of the Legislature having previously seen their districts or the plan as a whole. All Republican members of the Legislature had previously seen their individual districts along with visual aids demonstrating the partisan performance of their districts, but had not seen the overall map.

86. A public hearing was held on July 13, 2011. The bill was then passed by the Senate on July 19, 2011, and by the Assembly the next day on July 20, 2011. Act 43 was published on August 23, 2011.

87. Eric McLeod and Michael, Best & Friedrich, LLP, were paid $431,000.00 in State taxpayer funds for their work on the Current Plan.

88. "ADAMFOLZSUPPPROD000431" is true and correct copy of a page from Adam Foltz's calendar for June 20, 2011 – June 24, 2011.

89. "ADAMFOLZSUPPPROD000431" shows meetings with twenty-nine individual Republican legislators during the week of June 20, 2011 – June 24, 2011.

90. "ADAMFOLZSUPPPROD000424" is a true and correct copy of a document titled "General Talking Points" drafted by Adam Foltz in 2011 in advance of the individual meetings held with Republican legislators in June 2011, to discuss the redistricting plan that would become Act 43.

91. "ADAMFOLZSUPPPROD000119" is a true and correct copy of a series of 59 memos addressed to each Republican Assembly member, and CCed to Speaker Jeff Fitzgerald, Majority Leader Scott Suder, and Rep. Robin Vos, from Adam Foltz – Assembly Redistricting Coordinator, dated 6/19/2011 with the subject lines "New Map for the 1st District," "New Map for the 2nd District," and so on until "New Map for the 99th District."

92. Page 62 of 63 in document 156-1 filed on 2/14/12 in *Baldus v. Brennan*, 2:11-cv- 00562-JPS-

DPW-RMD, is a true and correct copy of an email from Tad Ottman to Jim Troupis, Raymond Taffora, Eric M. McLeod, and Adam Foltz, sent on July 12, 2011 at 10:00PM with the subject line "Hearing memos" and listing attachment titled "sb148 committee memos.docx."

93. Page 63 of 63 in document 156-1 filed on 2/14/12 in *Baldus v. Brennan*, 2:11-cv- 00562-JPS-DPW-RMD, is a true and correct copy of an email from Tad Ottman to Adam Foltz, sent on July 12, 2011 at 8:52PM with the subject line "committee memos" and listing attachment titled "sb146 committee memos.docx."

94. "ADAMFOLZSUPPPROD000446.PDF" is a true and correct copy of an email from Dana Wolff to Tad Ottman and Adam Foltz and CCed to Tony Van Der Wielen sent on Monday May 9, 2011 at 12:32PM, with the subject line "Letter" and listing attachment titled "MCD_Letter.pdf."

95. Page 56 of 63 in document 156-1 filed on 2/14/12 in *Baldus v. Brennan*, 2:11-cv-00562-JPS-DPW-RMD, is a true and correct copy of an email from Tad Ottman to Jim Troupis and Eric M McLeod, CCed to Adam Foltz, sent on Friday February 25, 2011 at 2:31PM, with the subject line "Redistricting timeline."

96. "MBF000217" is a true and correct copy of an email from Jim Troupis to Tad Ottman and Adam Folz, CCed to Eric M McLeod and Sarah Troupis, sent

on Monday, June 13, 2011 at 8:25AM, with the subject line "Gaddie & Hispanic."

97. Page 3 of 63 in document 156-1 filed on 2/14/12 in Baldus v. Brennan, 2:11-cv- 00562-JPS-DPW-RMD, is a true and correct copy of an email from Tad Ottman to Jim Troupis, Eric M. McLeod, Raymond Taffora, and Adam Foltz sent on Wednesday July 13, 2011 at 1:45PM with the subject line "Latino voices will be there."

98. "Foltz001075" is a true and correct copy of a chart prepared by Adam Foltz in 2011.

99. "Foltz001075" sets out the population deviations for the seats that were held following the 2010 elections by the "GOP," by "Indp" and by "Dem" in separate categories.

Professor Jackman's Reports

100. The efficiency gap indicates the extra proportion of seats that an advantaged party wins relative to a baseline where the parties are wasting equal numbers of votes. Jackman Rpt. (Dkt. 62) at 19.

101. Defendants' expert, Professor Goedert, "concur[s] that this shortcut is an appropriate and useful summary measure." Goedert Rpt. (Dkt. 51) at 5; Goedert Dep. (Dkt. 65) at 70:17-71:1.

102. Defendants' expert, Sean Trende, noted that in 2012 Professor Mayer calculated that the Current Plan had an efficiency gap of -11.7% using the full method and Mr. Trende calculated the efficiency gap for 2012 as -9.9% using the simplified method, a difference of 1.8 percentage points. Mayer Rpt. (Dkt. 54) at 46; Jackman Rpt. (Dkt. 62) at 71; Trende Rpt. (Dkt. 55) at 59.

103. Similarly, Mr. Trende noted that Professor Mayer calculated that the Demonstration Plan had an efficiency gap of -2.2% using the full method and Mr. Trende calculated the efficiency gap for 2012 as -0.8% using the simplified method, a difference of 1.4 percentage points. Mayer Rpt. (Dkt. 54) at 46; Jackman Rpt. (Dkt. 62) at 71; Trende Rpt. (Dkt. 55) at 60.

104. Under the simplified method only, the $(S - 0.5) - 2(V - 0.5)$ formula implies that for the efficiency gap to be zero, there must be a 2:1 relationship between seat share and vote share (also known as "responsiveness"). Jackman Rpt. (Dkt. 62) at 17-18.

105. As Professor Goedert has explained in his report and other work, a responsiveness of 2 "conform[s] with the observed average seat/votes curve in historical U.S. congressional and legislative elections." Goedert Rpt. (Dkt. 51) at 6; Goedert Dep. (Dkt. 65) at 95:17-21.

106. At the congressional level, the seat/vote curve had "an average slope of 2.02 for the past 40 years." During "the preceding 70 years," it had an "average of 2.09." Goedert Dep., Ex. 20 (Dkt. 65-2) at 7.

107. Professor Jackman's dataset used for his calculations of the efficiency gap in state legislative elections spans the period 1972 to 2014, representing the post-malapportionment era. Jackman Rpt. (Dkt. 62) at 19.

108. Professor Jackman's calculations of the efficiency gap rely on a dataset widely used in political science and freely available from the Inter-University Consortium for Political and Social Research (ICPSR study number 34297). The release of the dataset utilized by Professor Jackman covers state legislative election results from 1967 to 2014, updated by Carl Klarner (Indiana State University and Harvard University). Jackman Rpt. (Dkt. 62) at 20; Jackman Dep. (Dkt. 53) at 46:23-47:14.

109. Professor Jackman uses a subset of the original dataset for general elections since 1972 in states whose lower houses are elected via single-member districts, or where single- member districts are the norm. Professor Jackman treats multi-member districts "with positions" as if they are single-member districts. Jackman Rpt. (Dkt. 62) at 20; Jackman Dep (Dkt. 53) at 44:24-46:22.

110. The total dataset used by Professor Jackman spans 83,260 district-level state legislative races, from 786 elections across 41 states. Jackman Rpt. (Dkt. 62) at 20-21, and Figure 5. Jackman Dep. (Dkt. 53) 48:1-3.

111. Professor Jackman groups the efficiency gap scores across the series of elections held under the same districting plan, using the unique identifier for the districting plan in place for each state legislative election provided by Stephanopoulos and McGhee, as shown in the following chart:

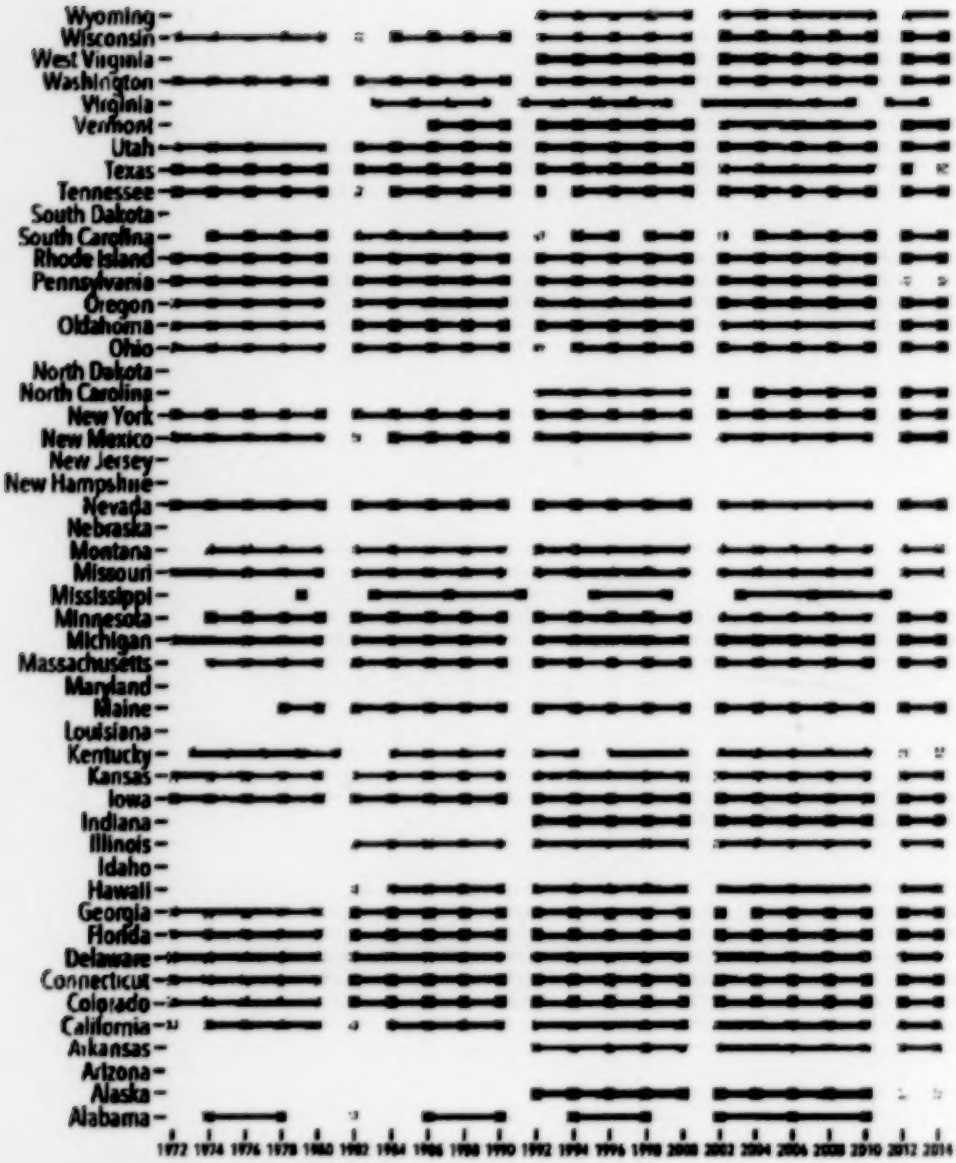

Figure 6: 786 state legislative elections available for analysis, 1972-2014, by state, grouped by districting plan (horizontal line).

Jackman Rpt. (Dkt. 62) at 22-23.

112. Professor Jackman calculated the efficiency gap for every state house election for which data was available over the period from 1972 to 2014, using actual election results. Professor Jackman did not

aggregate wasted votes district by district, but rather used a simplified computation method based on statewide electoral data, with the formula EG = (S – 0.5) – 2(V – 0.5), where EG is the efficiency gap, S is the statewide Democratic seat share, and V is the statewide Democratic vote share. Jackman Rpt. (Dkt. 62) at 16-17.

113. Professor Jackman's analysis found that for a plan with an initial efficiency gap of -7%, the average efficiency gap over the life of the plan is estimated to be -5.3%.

114. Similarly, Professor Jackman's analysis found that for a plan with an initial efficiency gap of 7%, the average efficiency gap over the life of the plan is estimated to be 3.7%.

115. The average *net* efficiency gap (i.e., the mean of the actual values of all plans' efficiency gaps in a given year) has recently trended in a Republican direction. This metric was mildly pro-Democratic from the early 1970s to the mid-1990s, but has been moderately pro-Republican from the mid-1990s to the present. Jackman Rpt. (Dkt. 62) at 44-45; Stephanopoulos & McGhee, *supra*, at 873.

116. There are 206 distinct plans in Professor Jackman's database. Of these, 70 plans (or 34%) had an initial efficiency gap greater than 7% in magnitude, and 32 plans (or 16%) had an initial efficiency gap greater than 10% in magnitude.

Jackman Rpt. (Dkt. 62) at 7; Jackman Rebuttal Rpt. (Dkt. 63) at 18-20; Jackman Decl. Ex. F (Dkt. 58-6).

117. Of the 70 plans that had an initial efficiency gap greater than 7% in magnitude, 43 plans (or 21% of the 206 total plans) were designed by a single party that had unified control over redistricting. Jackman Rpt. (Dkt. 62) at 7; Jackman Rebuttal Rpt. (Dkt. 63) at 18-20; Jackman Decl. Ex. F (Dkt. 58-6).

118. Of the 32 plans that had an initial efficiency gap greater than 10% in magnitude, 20 plans (or 10% of the 206 total plans) were designed by a single party that had unified control over redistricting. Jackman Rpt. (Dkt. 62) at 7; Jackman Rebuttal Rpt. (Dkt. 63) at 18-20; Jackman Decl. Ex. F (Dkt. 58-6).

119. Of the 43 plans from the current redistricting cycle in Professor Jackman's database, 16 (or 37% of the 43 plans) had initial efficiency gaps above 7% in magnitude, and of these, 11 plans (or 26% of the 43 plans) were designed by a single party that had unified control over redistricting. Jackman Rpt. (Dkt. 62) at 7; Jackman Rebuttal Rpt. (Dkt. 63) at 18-20; Jackman Decl. Ex. F (Dkt. 58-6).

120. Of the 43 plans from the current redistricting cycle in Professor Jackman's database, 11 plans (or 26% of the 43 plans) had initial efficiency gaps greater than 10% in magnitude and of these, 7 plans (or 16% of the 43 plans) were designed by a single party that had unified control over

redistricting. Jackman Rpt. (Dkt. 62) at 7; Jackman Rebuttal Rpt. (Dkt. 63) at 18-20; Jackman Decl. Ex. F (Dkt. 58-6).

121. The following chart identifies: (i) the number of plans, historically and currently, in Professor Jackman's database that had an initial efficiency gap above 7%; (ii) the number of plans with an initial efficiency gap above 7% *and* unified party control; (iii) the number of plans with an initial efficiency gap above 10%; and (iv) the number of plans with an initial efficiency gap above 10% *and* unified party control:

Historical		**Current**	
All plans	206	Current plans	43
All plans with initial *EG* above 7%	70	Current plans with initial *EG* above 7%	16
All plans with initial *EG* above 7% *and* unified party control over redistricting	43	Current plans with initial *EG* above 7% *and* unified party control over redistricting	11
All plans with initial *EG* above 10%	32	Current plans with initial *EG* above 10%	11

All plans with initial *EG* above 10% *and* unified party control over redistricting	20	Current plans with initial *EG* above 10% *and* unified party control over redistricting	7

Jackman Rpt. (Dkt. 62) at 7; Jackman Rebuttal Rpt. (Dkt. 63) at 18-20; Jackman Decl. Ex. F (Dkt. 58-6).

122. The proportion of plans created by Republicans in full control of the state government increased from about 10% in the 1990s, to about 20% in the 2000s, to about 40% in the 2010s (in 49 states, excluding Nebraska). By comparison, fewer than 20% of current plans were designed by Democrats in full control of the state government. Jackman Rebuttal Rpt. (Dkt. 63) at 19; Trende Dep. (Dkt. 66) at 79:11-23.

123. The reapportionment revolution of the 1960s resulted in the invalidation of almost every state house, state senate, and congressional plan in the country. Jackman Decl. Ex. J (Dkt. 58-10) at 4.

124. Wisconsin does not have equal turnout across Assembly districts.

125. In Wisconsin's 2012 Assembly elections, the turnout in individual districts varied from just over 8,000 votes in District 8 to over 37,000 votes in District 14.

126. In Wisconsin's 2014 elections, the turnout in individual districts varied from approximately 6,400 votes in District 8 to over 31,400 votes in District 23.

127. The presence of imputed vote totals leads to uncertainty in Professor Jackman's calculation of vote share, which "generates uncertainty in determining how far each point lies above or below the orange, zero efficiency gap benchmark."

128. Professor Jackman expresses his *EG* calculations as "point estimates" with lines indicating a 95% level of confidence.

129. Professor Jackman has less confidence in the "point estimate" of his *EG* as the number of uncontested seats increases.

130. Professor Jackman found that "[t]he distribution of *EG* measures trends in a pro–Republican direction through the 1990s, such that by the 2000s, *EG* measures were more likely to be negative (Republican efficiency over Democrats)."

131. Professor Jackman plotted the efficiency gap of each plan in each year from lowest to highest (from most favorable to Republicans to least) and then overlaying estimates of the smoothed weighted quantiles (with blue lines showing the 25th percentile, 50th percentile, and 75th percentile plan).

132. The median efficiency gap has been negative (favorable to the Republicans) since the mid–1990s.

133. The most favorable median toward Democrats since 2000 was in 2010.

134. The 25th percentile has been below 5% since the mid–1990s and even approached 7% in 2004, 2010, and 2012.

135. The 75th percentile has been below 5% since the mid–1990s and has hovered between 1% and 2% since 2000.

136. Professor Jackman's calculation of the "the probability that a given efficiency gap number from a given election year is positive or negative" also shows a trend in favor of Republicans.

137. Professor Jackman finds that in every election year since 1996, more plans have had negative efficiency gaps than positive ones with the exception of 2010.

138. In 2010, Professor Jackman found that the proportion of plans having a positive efficiency gap was slightly more than 0.5.

139. In 2006, 75% of plans produced a negative efficiency gap while only 25% of plans produced a

positive efficiency gap, with similar results in 2000 and 2012.

140. Since 1996, the year with the greatest proportion of efficiency gap measures favoring Democrats was 2010, in which there was a slightly more than a 50–50 probability of a plan being positive (favorable to Democrats).

141. Professor Jackman chose to look at the first election in the plan because he "tried to put [himself] in the shoes of litigants" who would have to "intervene early before we've seen much data all from the plan, the election results the plan is throwing off."

142. For all plans Professor Jackman studied since 1972, he finds that 36% of all plans produced an efficiency gap of 7% or greater in the first election: 18% on the positive side and 18% on the negative side.

143. For all plans Professor Jackman studied since 1991, 34% of all plans produced an efficiency gap greater than 7% in magnitude in the first election: 22% produced a gap of at least – 7% in magnitude and 12% percent produced a gap of at least +7% in magnitude.

144. For all plans since 1972 that Professor Jackman studied, he finds that 18% of plans that had an EG of at least –7% in magnitude go on to produce an election with a positive *EG*.

145. For all plans Professor Jackman studied since 1991, he finds that 40% of plans that produce an EG of at least +7% in magnitude in the first election go on to produce an election with a negative *EG*.

146. For all plans Professor Jackman studied since 1991, he finds that 18% of plans that produce an EG of at least –7% in magnitude in the first election go on to produce an election with a positive *EG*.

147. For all plans Professor Jackman studied since 1991, he finds that 60% of plans that produce an EG of at least +7% in magnitude in the first election go on to produce an election with a negative *EG*.

148. Professor Jackman finds that "we seldom see a plan in the 1990s or later that commence with a large–pro Democratic efficiency gap."

149. In the 1990s and later, Professor Jackman finds that the probability the first election has an efficiency gap greater than +5% (favorable to Democrats) "is only about 11%."

150. Negative efficiency gaps "are much more likely under the first election in post– 1990 plans: almost 40% of plans open with $EG < -.05$ and about 20% of plans open with $EG < -.10$."

151. Jackman finds that "plans with at least one election" of an efficiency gap of 7% or greater "are reasonably common."

152. Jackman finds that 53% of plans since 1972 have one election with an *EG* of 7% or greater in magnitude, with 29% of plans having a gap of –7% or greater in magnitude and 25% of plans having a gap of +7% or greater.

153. When looking at plans since 1991, 47% of plans have had at least one election with an *EG* greater than 7% in magnitude, with 38% of plans having an election with a gap of –7% or greater in magnitude and 19% of plans having an election with a gap of +7% or greater.

154. Since 1972, 33% of plans have had an election with an *EG* of 10% or greater in magnitude, with 18% having an election with a gap of –10% in magnitude and 15% having an election with a gap of +10% or greater.

155. When looking just at elections since 1991, 35% of plans have had an election with an *EG* of at least 10% in magnitude: 24% of plans have had an election with a gap of –10% in magnitude and 11% of plans having an election with a gap of +10%.

156. Professor Jackman found that 17 of the 141 plans for which he could calculated three or more efficiency gaps (12%) were "utterly unambiguous with respect to the sign of the efficiency gap," i.e., that even the confidence level bar did not cross over to the other sign.

157. Of these seventeen plans, sixteen of them were favorable to the Republicans and only one was favorable to the Democrats.

158. One of the "utterly unambiguous" plans was the Wisconsin 2002 Plan put in place by the federal court in *Baumgart v. Wendelberger*, No. 01–C–0121, 2002 WL 34127471, at *1 (E.D. Wis. May 30, 2002), amended, 2002 WL 34127473 (E.D. Wis. July 11, 2002).

159. Professor Jackman calculated *EGs* for the 2012 and 2014 elections for 39 states.

160. Fifty point estimates were negative (64.1%) while twenty-eight point estimates were positive (35.9%).

161. Eighteen states (46%) had point estimates for 2012 and 2014 that were both negative.

162. Included among this eighteen were Minnesota, Missouri, New York, and Kansas.

163. With respect to the entire country, Professor Jackman found that "[t]he distribution of *EG* measures trends in a pro–Republican direction through the 1990s, such that by the 2000s, *EG* measures were more likely to be negative."

164. The median plan has been negative since the mid–1990s and the 25th percentile has been below

5% since the mid–1990s and even approached 7% in 2004, 2010, and 2012.

165. Meanwhile the seventy–fifth percentile has only favored Democrats by 1%–2%.

166. In every election year since 1996, more plans have had negative efficiency gaps than positive ones with about 75% of plans producing a negative efficiency gap in 2000, 2006 and 2012.

167. In 2012, the Republicans won five seats (Districts 1, 26, 50, 72 and 93) with no more than 51.3% of the total vote.

168. The margin of victory across all of these races was about 3,200 votes, each less than 900 votes and one at only 109 votes (District 93).

169. For 2012 and 2014, Professor Jackman calculates that Illinois had one negative efficiency gap and one narrowly positive efficiency gap.

Professor Mayer's Reports

170. To generate his baseline partisanship estimates, Professor Mayer assumed that all districts were contested and that no incumbents were running. This method removes the effect of incumbents, who may or may not be running in an alternative plan. The consultant retained by the state legislature, Professor Gaddie, used the same method. Mayer Rpt.

(Dkt. 54) at 31; Mayer Dep. (Dkt. 52) at 63:15-24, 70:4-17; Gaddie Dep. (Dkt. 108) at 43:9-44:22.

171. Professor Mayer's regression model used wards as the unit of analysis to increase the number of observations and allow for more precise estimates. Mayer Rpt. (Dkt. 54) at 8.

172. Professor Mayer's regression model relied on demographic and electoral data provided by the LTSB and the G.A.B., both online and in the 2013 edition of the Wisconsin Blue Book. Mayer Rpt. (Dkt. 54) at 10.

173. The full specification for the regression model that Professor Mayer used is:

$$\underset{i}{Assembly\ Vote} = \alpha + \beta_1 Total\ VEP_i + \beta_2 Black\ VEP_i + \beta_3 Hispanic\ VEP_i$$

$$+\beta_4 \underset{i}{Democratic\ Presidential\ Vote} + \beta_5 \underset{i}{Republican\ Presidential\ Vote}$$

$$+\beta_6 \underset{i}{Democratic\ Incumbent} + \beta_7 \underset{i}{Republican\ Incumbent} + \sum_{j=1}^{71} \gamma_j County_j + \varepsilon_i$$

Where

Assembly Vote	Number of votes cast for the Republican or Democratic candidate in the 2012 Assembly election in ward *i*. I estimate separate equations for the Democratic and Republican candidates
Total VEP	Voting eligible population in ward *i*, as measured in the 2010 Census
Black VEP	Voting eligible Black population in ward *i*
Hispanic VEP	Voting eligible Hispanic population in ward *i*
Democratic Presidential Vote	Number of votes cast for Barack Obama in the 2012 presidential election in ward *i*
Republican Presidential Vote	Number of votes cast for Mitt Romney in the 2012 presidential election in ward *i*
Democratic Incumbent	1 if the Assembly election in ward *i* has a Democratic incumbent, 0 otherwise, multiplied by the VEP in ward *i*
Republican Incumbent	1 if the Assembly election in ward *i* has a Republican incumbent, 0 otherwise, multiplied by the VEP in ward *i*
County	Set of fixed effects dummy variables for each county. Dunn County is the excluded value.[9]

Mayer Rpt. (Dkt. 54) at 10-11.

174. The full specification for the regression model that Professor Mayer used includes the Assembly vote by ward as the dependent variable and the following as independent variables (each by ward): total voting eligible population; black voting eligible population; Hispanic voting eligible

population; Democratic presidential vote; Republican presidential vote; Democratic incumbent; Republican incumbent; and a set of fixed effect dummy variables for each county, with Dunn County as the excluded value. Mayer Rpt. (Dkt. 54) at 10-11.

175. Professor Keith Gaddie used a regression model "very similar" to the one used by Professor Mayer in 2002 in the *Baumgart* litigation, stating that he "basically replicated [Professor Mayer's] model," to predict the Current Plan's partisan consequences prior to the Plan's enactment. Gaddie Dep. (Dkt. 108) at 53:3-7, 47:10-14, 43:9-44:22; Mayer Rpt. (Dkt. 54) at 29.

176. In Table 2, Professor Mayer's regression model incorrectly predicted the outcomes of only two extremely competitive districts: District 51 (actual Republican vote: 51.9%; predicted Republican vote: 49.9%) and District 70 (actual Republican vote: 49.7%; predicted Republican vote: 50.1%). Mayer Rpt. (Dkt. 54) at 24-25; Mayer Dep. (Dkt. 52) at 87:22-23.

177. According to Table 2, these incorrect predictions are balanced, one for each party, meaning that in the aggregate, Professor Mayer's model estimated the partisan distribution of contested districts in 2012 (56 Republican, 16 Democratic) with perfect accuracy. Mayer Rpt. (Dkt. 54) at 24-25.

178. Professor Mayer's baseline partisanship model produces the following vote totals and two-party vote percentages:

City	Dem. Votes	Rep. Votes	Total
Milwaukee	193,940 (77.9%)	54,992 (22.1%)	248,932
Madison	109,466 (78.0%)	30,928 (22.0%)	140,394
Green Bay	23,403 (55.2%)	18,998 (44.8%)	42,402
Kenosha	26,515 (62.6%)	15,828 (37.4%)	42,342
Racine	22,614 (70.4%)	9,517 (29.6%)	32,131
Appleton	18,232 (51.6%)	17,129 (48.4%)	35,361
Waukesha	15,257 (37.6%)	25,273 (62.4%)	40,530
Oshkosh	17,364 (52.1%)	15,945 (47.9%)	33,309
Eau Claire	20,601 (59.2%)	14,202 (40.8%)	34,803
Janesville	20,208 (58.9%)	14,080 (41.1%)	34,288
La Crosse	17,554 (67.4%)	8,485 (32.6%)	26,039
Sheboygan	14,573 (56.5%)	11,215 (43.5%)	25,787
Beloit	11,440 (63.3%)	6,623 (36.7%)	18,062

179. Professor Mayer's baseline partisanship model for Act 43 produces 197 wasted votes for the Republicans and 16,235 wasted votes for the Democrats in District 1.

180. In the actual 2012 election, in District 1 the Republican won with 16,993 votes and the Democrat lost with 16,124 votes.

181. In the actual election, in District 1, there were 435 wasted votes for the Republicans and 16,124 wasted votes for the Democrats.

182. In the actual 2012 election, the Republican candidate won District 50 with 12,842 votes to the Democratic candidate's 11,945 votes.

183. In the actual election, the Republican candidate won District 51 with 10,642 votes to the Democratic candidate's 10,577 votes.

184. In the actual election, the Republican candidate won District 68 with 13,758 votes to the Democratic candidate's 12,482 votes.

185. In the actual election, the Democratic candidate won District 70 with 13,518 votes to the Republican candidate's 13,374.

186. For his model, Professor Mayer admits that "the average absolute error in the vote margin is 1.49%."

187. Professor Mayer's baseline partisanship model of Act 43 contains 42 districts with at least a 50% Democratic baseline.

188. Professor Mayer's baseline partisanship model of Act 43 contains 17 seats that have a baseline between 50–55% Republican. These districts and percentages are shown in the chart below, from the least Republican to the most Republican:

District	Mayer Baseline Rep. %
93	50.2%
1	50.6%
67	51.6%
29	52.2%
88	52.3%
4	52.3%
49	52.5%
27	52.7%
42	53.0%
26	53.3%
62	53.9%
31	54.1%
70	54.1%
40	54.2%
28	54.6%
30	54.7%
21	54.9%

Comparison of Act 43 with Prior Plans

189. In the 1980s, a federal court drew the State Assembly districts. *Wisc. State AFL- CIO v. Elections*

Bd., 543 F. Supp. 630 (E.D. Wis. 1982). The districts were amended by a legislature and Governor with unified Democratic control in 1983 and used for the period 1984-1990.

190. The average efficiency gap of the Wisconsin State Assembly redistricting plan from 1992-2000 was -2.4%. Jackman Rpt. (Dkt. 62) at 72; Jackman Decl. Ex. F (Dkt. 58-6) at 18.

191. In the 1990s, a federal court drew the State Assembly districts. *Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992). The *Prosser* court took into account likely electoral effects and designed the map that was the "least partisan" and "create[d] the least perturbation in the political balance of the state." *Id.* at 871.

192. The average efficiency gap of the Wisconsin State Assembly redistricting plan from 2002-2010 was -7.6%. Jackman Rpt. (Dkt. 62) at 72; Jackman Decl. Ex. F (Dkt. 58-6) at 25.

193. In the 2000s, a federal court drew the State Assembly districts. See *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. May 30, 2002).

194. A summary of the average efficiency gap for each decade, and the list of who was in control of the redistricting process is shown in this table:

Decade	Control of government	Average efficiency gap
1972-1980	Divided	-0.3%
1982-1990	Court drawn, then unified Democratic control	-1.9%
1992-2000	Court drawn	-2.4%
2002-2010	Court drawn	-7.6%

195. Between 1972 and 2014, fewer than four percent of all state house plans nationwide had an efficiency gap with an absolute value of 13% or higher. Jackman Rpt. (Dkt. 62) at 7; Defs. Adnission to RFA #20.

196. Between 1972 and 2010, no state house plan anywhere in the United States had an efficiency gap as large as the Current Plan in the first two elections after redistricting. Jackman Rpt. (Dkt. 62) at 4; Defs. Admission to RFA #21.

197. The Current Plan created six black-majority districts (districts 10-12 and 16-18), ranging from 56.7% to 67.6% black population, and from 51.1% to 61.8% black voting age population. The Demonstration Plan retains six black-majority districts, ranging from 60.0% to 63.4% black

population, and from 56.2% to 60.5% black voting age population. Mayer Rpt. (Dkt. 54) at 37.

198. In *Baldus v. Wisc. Gov't Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012), a federal court created a Latino-majority district in Milwaukee (District 8). The Demonstration Plan retains the boundaries of this district. Mayer Rpt. (Dkt. 54) at 38.

199. According to the 2010 Census, Wisconsin is 70.2% urbanized, and according to the 2014 update to the Census, Wisconsin is 6.6% black and 6.5% Hispanic.

200. The 1992 Assembly map entered by the Prosser court plan had an overall range of population deviation of 0.91 percent, with 48 districts below the ideal and 51 above the ideal. Only one district was more than a half point away from the ideal. In the Senate, the 1992 plan had an overall deviation range 0.52 percent, with 15 districts above the ideal population and 18 below the ideal.

201. The 2002 Assembly map entered by the *Baumgart* court had an overall range of 1.59 percent deviation, with 47 districts above the ideal, 51 below the ideal, and one exactly apportioned district. In the Senate, the overall deviation range of the 2002 map was 0.98 percent, with 15 districts above the ideal population, 17 below, and one perfectly apportioned. Of the 99 Assembly districts in 2002, 77 districts were

within +/- 0.5 percent of the ideal population; in the Senate, 32 of 33 districts fell in this range.

202. Act 43 creates 99 Assembly districts with populations falling within a range of 0.76 percent (+0.39 percent to -0.37 percent) of the ideal population; 56 districts are above the ideal population, 41 are below the ideal, and two districts are perfectly apportioned. In the Senate, population variations fall within a range of 0.62 percent (+0.35 percent to -0.27 percent); 17 districts are above the ideal population, 14 are below the ideal, and two districts are perfectly apportioned.

203. The population deviation in Act 43 from the ideal for each Assembly and Senate district (using 2010 Census data) is described in the Appendix to Act 43 and Tables 2 and 3 to the pretrial report filed in the *Baldus* case on February 14, 2012.

204. A summary of population deviation in Assembly districts in Act 43, the 1992 plan, and the 2002 plan is in Table 4 of the pretrial report filed in the *Baldus* case on February 14, 2012.

205. Each state Senate district is composed of three entire state Assembly districts.

206. Assembly members serve two-year terms. Senators serve four-year, staggered terms with half elected in presidential years and the other half coincident with gubernatorial elections.

207. The 1992 Federal Court map for the Assembly split 72 municipalities.

208. In 2002, the Federal Court's Assembly map split 50 municipalities.

209. Act 43 splits 62 municipalities in the Assembly.

210. The 1992 Federal Court map split 47 counties in the Assembly.

211. In 2002, the Federal Court divided 51 counties in the Assembly

212. Act 43 splits 58 counties in the Assembly.

213. Two widely-used measures of compactness applied to legislative districts are the Perimeter-to-Area measure and the Smallest Circle score.

214. The Perimeter-to-Area measure compares the relative length of the perimeter of a district to its area. It represents the area of the district as the proportion of the area of a circle with the same perimeter. The score ranges from 0 to 1, with a value of 1 indicating perfect compactness. This score is achieved if a district is a circle. Most redistricting software generates this measure as the Polsby-Popper statistic.

215. Smallest Circle scores measure the space occupied by the district as a proportion of the space of the smallest encompassing circle, with values ranging from 0 to 1. A value of 1 indicates perfect compactness and is achieved if a district is a circle. This statistic is often termed the Reock measure by redistricting applications. Ernest C. Reock, Jr. 1961, "A Note: Measuring Compactness as a Requirement of Legislative Apportionment," *Midwest Journal of Political Science* 5: 70-74.

216. The average Smallest Circle score for the entire Assembly map is 0.39 (range from 0.20 to 0.61).

217. The average Smallest Circle score for the entire Assembly map drawn by the *Baumgart* court in 2002 was 0.41 (range from 0.18 to 0.63).

218. The average Perimeter To Area score for the Assembly map is .28 (range of .05 to .56).

219. The average Perimeter To Area score for the Assembly map drawn by the *Baumgart* court in 2002 was 0.29 (range of 0.06 to 0.58).

220. The average Assembly compactness scores are marginally lower for Act 43 than for the 2002 court-crafted plan.

221. The following chart contains a summary of municipal splits, county splits and compactness scores for Act 43 and prior plans.

	Municipal Splits	County Splits	Reock (mean)	Polsby-Popper (mean)
1972 Plan		49		
1982 Plan		41		
1992 Plan	72	47		
2002 Plan	50	51	0.41	0.29
Act 43	62	58	0.39	0.28

222. The average efficiency gap of the Wisconsin State Assembly redistricting plan from 1972-1980 was -0.3%, and it was drawn by divided government. Jackman Rpt. (Dkt. 62) at 72; Jackman Decl. Ex. F (Dkt. 58-6) at 3.

223. The average efficiency gap of the Wisconsin State Assembly redistricting plan from 1982-1990 was -1.9%. Jackman Rpt. (Dkt. 62) at 72; Jackman Decl. Ex. F (Dkt. 58-6) at 11.

The Demonstration Plan

224. There are eighteen districts in Professor Mayer's Demonstration Plan that are 50%– 55% Democratic under his baseline partisanship model, assuming all seats were contested and no incumbents were running, including sixteen districts between 50%–53.4%. The following table shows these districts ordered from least Democratic to most Democratic.

Demonstration Plan District	Predicted Dem. Vote %
49	50.3%
92	50.5%
86	50.7%
96	51.5%
91	51.7%
81	51.8%
40	51.9%
42	51.9%
67	51.9%
71	52.1%
20	52.3%
29	52.3%
51	52.6%
64	52.8%
54	53.4%
57	53.4%
2	54.1%
45	54.6%

225. In the 2014 election environment the statewide vote for Democratic candidates for the Assembly fell 3.4 percentage points, from 51.4% down to 48.0%.

226. On the criteria listed below, the Demonstration Plan performs as shown in the table below:

		Demonstration Plan	Act 43
Population Deviation		0.86%	0.76%
Average Compactness (Reock)		0.41	0.39
Number of Municipal Splits	County	55	58
	City Town Village	64	62

Mayer Rpt. (Dkt. 54) at 37.

227. The Demonstration Plan has a marginally larger population deviation than the Current Plan (0.86% versus 0.76%), but is well below even the strictest standards applied to state legislative plans. Mayer Rpt. (Dkt. 54) at 37.

228. The Demonstration Plan's districts are slightly more compact on average than the Current Plan's, with an average Reock score of 0.41, compared to 0.39 for the Current Plan. Mayer Rpt. (Dkt. 54) at 37.

229. The Demonstration Plan has one fewer municipal split than the Current Plan (119 versus 120). Mayer Rpt. (Dkt. 54) at 37.

History of Elections in Wisconsin

230. The Government Accountability Board's official election results are authoritative for Wisconsin elections dating back to the year 2000.

231. For elections in years prior to 2000, the Wisconsin Blue Book's election results are authoritative.

232. The City of Milwaukee Election Commission maintains election results dating back to 1997 on its website. These results are authoritative for election results in the City of Milwaukee.

233. The following chart contains the number of seats won by Democratic, Republican and Independent candidates in the November general elections from 1972 to 2014. The party with the majority is listed in bold.

Year	Democrat	Republican	Independent
1972	**62**	37	
1974	**63**	36	
1976	**66**	33	
1978	**60**	39	
1980	**59**	40	
1982	**59**	40	
1984	**52**	47	
1986	**54**	45	
1988	**56**	43	
1990	**58**	41	
1992	**52**	47	
1994	48	**51**	
1996	47	**52**	

1998	44	**55**	
2000	43	**56**	
2002	41	**58**	
2004	39	**60**	
2006	47	**52**	
2008	**52**	46	1
2010	38	**60**	1
2012	39	**60**	
2014	36	**63**	

234. The Democrats won a majority of seats in the Wisconsin Assembly in each general election from 1972 through 1994.

235. The Republicans won a majority of seats in the Wisconsin Assembly in each general election from 1994 through 2014, with the exception of the 2008 election.

236. The Assembly map in place for the 1972, 1974, 1976, 1978 and 1980 plans was enacted by the Democratic Assembly and Republican Senate and signed by a Democratic Governor.

237. The Assembly map in place for the 1982 election was put in place by the federal court in *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982).

238. The Assembly map in place for the 1982 election was amended and enacted by the Democratic Assembly and Democratic Senate and signed by a

Democratic Governor and was then in place for the 1984, 1986, 1988 and 1990 elections.

239. The Assembly map in place for the 1992, 1994, 1996, 1998 and 2000 elections was drawn by the federal court in *Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992).

240. The Assembly map in place for the 2002, 2004, 2006, 2008 and 2010 elections was drawn by the federal court in *Baumgart v. Wendelberger*, No. 01–C–0121, 2002 WL 34127471, at *1 (E.D. Wis. May 30, 2002), *amended*, 2002 WL 34127473 (E.D. Wis. July 11, 2002).

241. Professor Jackman analyzed each Wisconsin Assembly elections since 1972 and found that Wisconsin's *EG* has ranged from a high (most favorable to Democrats) of +2.48% in 1994 to a low (most favorable to Republicans) of –13.31% in 2012.

242. Disregarding results from the current plan, the lowest *EG* was –11.83% in 2006.

243. The most favorable *EG* towards Democrats notably occurred in 1994 when the Republicans gained control of the Assembly for the first time since the 1968 election.

244. Professor Jackman finds that "Wisconsin has recorded an unbroken run of negative *EG* estimates from 1998 to 2014."

245. The last positive *EG* that Professor Jackman found in Wisconsin was the 2.48% from 1994.

246. With respect to the 2002 Plan, Professor Jackman calculated an average efficiency gap of –7.6%, with –4.0% as the most favorable year to Democrats and –11.8% as the most favorable year to Republicans.

247. In 1992, the Democrats' seat share, rounded to the nearest 0.25%, was 52.5%. Given that Professor Jackman calculates an *EG* of –2%, the Democratic vote share was 52.25% because the implied seat share if the efficiency gap was zero is 54.5%.

248. In 1994, the Democrats' seat share, rounded to the nearest 0.25%, was 48.5%. Given that Professor Jackman calculates an *EG* of +2%, the Democratic vote share was 48.25% because the implied seat share if the efficiency gap was zero is 46.5%.

249. In 1996, the Democrats' seat share, rounded to the nearest 0.25%, was 47.5%. Given that Professor Jackman calculates an *EG* of 0%, the Democratic vote share was 48.75% because the implied seat share if the efficiency gap was zero is 47.5%.

250. In 1998, the Democrats' seat share, rounded to the nearest 0.25%, was 44.5%. Given that Professor Jackman calculates an *EG* of –7.5%, the Democratic vote share was 51% because the implied seat share if the efficiency gap was zero is 52%.

251. In 2000, the Democrats' seat share, rounded to the nearest 0.25%, was 43.5%. Given that Professor Jackman calculates an *EG* of –6%, the Democratic vote share was 49.75% because the implied seat share if the efficiency gap was zero is 49.5%.

252. In 2002, the Democrats' seat, share rounded to the nearest 0.25%, was 41.5%.Given that Professor Jackman calculates an EG of –7.5%, the Democratic vote share was 49.5% because the implied seat share if the efficiency gap was zero is 49%.

253. In 2004, the Democrats' seat share, rounded to the nearest 0.25%, was 40%. Given that Professor Jackman calculates an *EG* of –10%, the Democratic vote share was 50% because the implied seat share if the efficiency gap was zero is 50%.

254. In 2006, the Democrats' seat share, rounded to the nearest 0.25%, was 47.5%. Given that Professor Jackman calculates an *EG* of –12%, the Democratic vote share was 54.75% because the implied seat share if the efficiency gap was zero is 59.5%.

255. In 2008, the Democrats' seat share, rounded to the nearest 0.25%, was 53%. Given that Professor Jackman calculates an *EG* of –5%, the Democratic vote share was 54% because the implied seat share if the efficiency gap was zero is 58%.

256. In 2010, the Democrats' seat share, rounded to the nearest 0.25%, was 39%. Given that Professor Jackman calculates an *EG* of –4%, the Democratic vote share was 46.5% because the implied seat share if the efficiency gap was zero is 43%.

257. In 2012, Professor Jackman calculates that the Democrats' vote share was 51.4%. This yields an implied seat share of 52.8% if the efficiency gap was zero. The Democrats' actual seat share was 39.4%, yielding an efficiency gap of –13.4%.

258. In 2014, Professor Jackman calculates that the Democrats' vote share was 48.0%. This yields an implied seat share of 46.0% if the efficiency gap was zero. Their actual seat share was 36.4%, which yields an efficiency gap of –9.6%.

259. In 1988, Michael Dukakis, the Democratic candidate for President, won 1,126,794 votes in Wisconsin to Republican George H.W. Bush's 1,047,499 votes, winning 51.8% of the two-party vote.

260. In the presidential election nationwide, George H.W. Bush won 53.9% of the two- party vote and Dukakis won 46.1%.

261. The following chart shows the vote totals for Dukakis and Bush in each county in Wisconsin.

County	Dukakis Vote	Bush Vote	Two Party Total
Adams	3,598	3,258	6,856
Ashland	4,526	2,926	7,452
Barron	8,951	8,527	17,478
Bayfield	4,323	3,095	7,418
Brown	41,788	43,625	85,413
Buffalo	3,481	2,783	6,264
Burnett	3,537	2,884	6,421
Calumet	6,481	8,107	14,588
Chippewa	11,447	9,757	21,204
Clark	6,642	6,296	12,938
Columbia	9,132	10,475	19,607
Crawford	3,608	3,238	6,846
Dane	105,414	69,143	174,557
Dodge	12,663	17,003	29,666
Door	5,425	6,907	12,332
Douglas	13,907	6,440	20,347
Dunn	9,205	7,273	16,478
Eau Claire	21,150	17,664	38,814
Florence	1,018	1,106	2,124
Fond du Lac	15,887	21,985	37,872
Forest	2,142	1,845	3,987
Grant	9,421	10,049	19,470
Green	5,153	6,636	11,789
Green Lake	3,033	5,205	8,238
Iowa	4,268	4,240	8,508

County	Dukakis Vote	Bush Vote	Two Party Total
Iron	2,090	1,599	3,689
Jackson	3,924	3,555	7,479
Jefferson	11,816	14,309	26,125
Juneau	3,734	4,869	8,603
Kenosha	30,089	21,661	51,750
Kewaunee	4,786	4,330	9,116
La Crosse	22,204	21,548	43,752
Lafayette	3,521	3,665	7,186
Langlade	4,254	4,884	9,138
Lincoln	5,819	5,257	11,076
Manitowoc	19,680	16,020	35,700
Marathon	24,658	24,482	49,140
Marinette	8,030	9,637	17,667
Marquette	2,463	3,059	5,522
Menominee	1,028	381	1,409
Milwaukee	268,287	168,363	436,650
Monroe	6,437	7,073	13,510
Oconto	6,549	7,084	13,633
Oneida	7,414	8,130	15,544
Outagamie	27,771	33,113	60,884
Ozaukee	12,661	22,899	35,560
Pepin	1,906	1,311	3,217
Pierce	8,659	6,045	14,704
Polk	8,981	6,866	15,847
Portage	16,317	12,057	28,374
Price	3,987	3,450	7,437
Racine	39,631	36,342	75,973

County	Dukakis Vote	Bush Vote	Two Party Total
Richland	3,643	4,026	7,669
Rock	29,576	28,178	57,754
Rusk	3,888	3,063	6,951
St. Croix	11,392	9,960	21,352
Sauk	8,324	10,225	18,549
Sawyer	3,231	3,260	6,491
Shawano	6,587	8,362	14,949
Sheboygan	23,429	23,471	46,900
Taylor	3,785	4,254	8,039
Trempealeau	6,212	4,902	11,114
Vernon	5,754	5,226	10,980
Vilas	3,781	5,842	9,623
Walworth	12,203	18,259	30,462
Washburn	3,393	3,074	6,467
Washington	15,907	24,328	40,235
Waukesha	57,598	90,467	148,065
Waupaca	7,078	11,559	18,637
Waushara	3,535	4,953	8,488
Winnebago	28,508	35,085	63,593
Wood	16,074	16,549	32,623
	1,126,794	1,047,499	2,174,293

262. In 1992, Bill Clinton, the Democratic candidate for President, won 1,041,066 votes in Wisconsin to Republican George H.W. Bush's 930,855, winning 52.8% of the two-party vote share.

263. In the presidential election nationwide, Clinton won 53.5% of the two-party vote share to Bush's 46.5%.

264. The following chart shows the vote totals for Clinton and Bush in each county in Wisconsin.

County	Clinton Vote	Bush Vote	Two Party Total
Adams	3,539	2,465	6,004
Ashland	4,213	2,372	6,585
Barron	8,063	6,572	14,635
Bayfield	3,873	2,393	6,266
Brown	37,513	42,352	79,865
Buffalo	2,996	2,029	5,025
Burnett	3,172	2,340	5,512
Calumet	5,701	7,541	13,242
Chippewa	10,487	8,215	18,702
Clark	5,540	4,977	10,517
Columbia	9,348	9,099	18,447
Crawford	3,540	2,390	5,930
Dane	114,724	61,957	176,681
Dodge	11,438	14,971	26,409
Door	4,735	5,468	10,203
Douglas	12,319	5,679	17,998
Dunn	7,965	5,283	13,248
Eau Claire	21,221	15,915	37,136
Florence	978	942	1,920
Fond du Lac	13,757	19,785	33,542

County	Clinton Vote	Bush Vote	Two Party Total
Forest	1,904	1,393	3,297
Grant	8,914	7,678	16,592
Green	5,467	4,887	10,354
Green Lake	2,772	3,897	6,669
Iowa	4,467	3,288	7,755
Iron	1,762	1,273	3,035
Jackson	3,681	2,644	6,325
Jefferson	11,593	13,072	24,665
Juneau	4,177	4,051	8,228
Kenosha	27,341	19,854	47,195
Kewaunee	4,050	3,570	7,620
La Crosse	22,838	18,891	41,729
Lafayette	3,143	2,582	5,725
Langlade	3,630	3,890	7,520
Lincoln	5,297	4,321	9,618
Manitowoc	15,903	14,008	29,911
Marathon	21,482	20,948	42,430
Marinette	7,626	7,984	15,610
Marquette	2,533	2,322	4,855
Menominee	691	244	935
Milwaukee	235,521	151,314	386,835
Monroe	6,427	6,118	12,545
Oconto	5,898	5,720	11,618
Oneida	7,160	6,725	13,885
Outagamie	23,735	30,370	54,105
Ozaukee	11,879	22,805	34,684
Pepin	1,673	1,098	2,771

County	Clinton Vote	Bush Vote	Two Party Total
Pierce	7,824	4,844	12,668
Polk	7,746	5,446	13,192
Portage	15,553	10,914	26,467
Price	3,575	2,654	6,229
Racine	34,875	32,310	67,185
Richland	3,458	3,144	6,602
Rock	31,154	21,942	53,096
Rusk	3376	2,430	3,376
St. Croix	10281	8,114	10,281
Sauk	9128	8,886	9,128
Sawyer	2796	2,658	2,796
Shawano	6,062	7,253	13,315
Sheboygan	20,568	22,526	43,094
Taylor	3,305	3,415	6,720
Trempealau	6,218	3,577	9,795
Vernon	5,673	4,072	9,745
Vilas	3,764	4,616	8,380
Walworth	11,825	15,727	27,552
Washburn	3,080	2,586	5,666
Washington	13,339	22,739	36,078
Waukesha	50,270	91,461	141,731
Waupaca	6,666	10,252	16,918
Waushara	3,402	4,045	7,447
Winnebago	27,234	33,709	60,943
Wood	13,208	13,843	27,051
	1,041,066	930,855	1,971,921

265. In 1996, Bill Clinton, the Democratic candidate for President, won 1,071,971 votes in Wisconsin to Republican Bob Dole's 845,029 votes, winning 55.9% of the two-party vote share.

266. In the presidential election nationwide, Clinton won 54.7% of the two-party vote to Dole's 45.3%.

267. Bill Clinton won Milwaukee, Dane and Rock Counties with 64% of the two–party vote and carried the rest of the state with 52% of the vote, a difference of twelve percentage points.

268. The following chart shows the vote totals for Clinton and Dole in each county in Wisconsin.

County	Clinton Vote	Dole Vote	Two Party Total
Adams	4,119	2,450	6,569
Ashland	3,808	1,863	5,671
Barron	8,025	6,158	14,183
Bayfield	3,895	2,250	6,145
Brown	42,823	38,563	81,386
Buffalo	2,681	1,800	4,481
Burnett	3,625	2,452	6,077
Calumet	6,940	7,049	13,989
Chippewa	9,647	7,520	17,167
Clark	5,540	4,622	10,162
Columbia	10,336	8,377	18,713

County	Clinton Vote	Dole Vote	Two Party Total
Crawford	3,658	2,149	5,807
Dane	109,347	59,487	168,834
Dodge	12,625	12,890	25,515
Door	5,590	4,948	10,538
Douglas	10,976	5,167	16,143
Dunn	7,536	4,917	12,453
Eau Claire	20,298	13,900	34,198
Florence	869	927	1,796
Fond du Lac	15,542	16,488	32,030
Forest	2,092	1,166	3,258
Grant	9,203	7,021	16,224
Green	6,136	4,697	10,833
Green Lake	3,152	3,565	6,717
Iowa	4,690	2,866	7,556
Iron	1,725	1,260	2,985
Jackson	3,705	2,262	5,967
Jefferson	13,188	12,681	25,869
Juneau	4,331	3,226	7,557
Kenosha	27,964	18,296	46,260
Kewaunee	4,311	3,431	7,742
La Crosse	23,647	16,482	40,129
Lafayette	3,261	2,172	5,433
Langlade	4,074	3,206	7,280
Lincoln	6,166	4,076	10,242
Manitowoc	16,750	13,239	29,989
Marathon	24,012	19,874	43,886

County	Clinton Vote	Dole Vote	Two Party Total
Marinette	2,859	2,208	5,067
Marquette	2,859	2,208	5,067
Menominee	992	230	1,222
Milwaukee	216,620	119,407	336,027
Monroe	6,924	5,299	12,223
Oconto	6,723	5,389	12,112
Oneida	7,619	6,339	13,958
Outagamie	28,815	27,758	56,573
Ozaukee	13,269	22,078	35,347
Pepin	1,585	1,007	2,592
Pierce	7,970	4,599	12,569
Polk	8,334	5,387	13,721
Portage	15,901	9,631	25,532
Price	3,523	2,545	6,068
Racine	38,567	30,107	68,674
Richland	3,502	2,642	6,144
Rock	32,450	20,096	52,546
Rusk	2941	2,219	2,941
St. Croix	11384	8,253	11,384
Sauk	9889	7,448	9,889
Sawyer	2773	2,603	2,773
Shawano	6,850	6,396	13,246
Sheboygan	22,022	20,067	42,089
Taylor	3,253	3,108	6,361
Trempealau	5,848	3,035	8,883
Vernon	5,572	3,796	9,368

County	Clinton Vote	Dole Vote	Two Party Total
Vilas	4,226	4,496	8,722
Walworth	13,283	15,099	28,382
Washburn	3,231	2,703	5,934
Washington	17,154	25,829	42,983
Waukesha	57,354	91,729	149,083
Waupaca	7,800	8,679	16,479
Waushara	3,824	3,573	7,397
Winnebago	29,564	27,880	57,444
Wood	14,650	12,666	27,316
	1,071,971	845,029	1,917,000

269. In 2000, Albert Gore, the Democratic candidate for President, won 1,242,987 votes in Wisconsin to Republican George W. Bush's 1,237,279 votes, winning 50.1% of the two-party vote.

270. In the presidential election nationwide, Gore won 50.27% of the two-party vote to Bush's 49.73%.

271. The following chart shows the vote totals for Gore and Bush in each county in Wisconsin, as well as a subtotal for votes in the City of Milwaukee.

County	Gore Vote	Bush Vote	Two Party Total
Adams	4,826	3,920	8,746
Ashland	4,356	3,038	7,394
Barron	8,928	9,848	18,776
Bayfield	4,427	3,266	7,693
Brown	49,096	54,258	103,354
Buffalo	3,237	3,038	6,275
Burnett	3,626	3,967	7,593
Calumet	8,202	10,837	19,039
Chippewa	12,102	12,835	24,937
Clark	5,931	7,461	13,392
Columbia	12,636	11,987	24,623
Crawford	4,005	3,024	7,029
Dane	142,317	75,790	218,107
Dodge	14,580	21,684	36,264
Door	6,560	7,810	14,370
Douglas	13,593	6,930	20,523
Dunn	9,172	8,911	18,083
Eau Claire	24,078	20,921	44,999
Florence	816	1,528	2,344
Fond du Lac	18,181	26,548	44,729
Forest	2,158	2,404	4,562
Grant	10,691	10,240	20,931
Green	7,863	6,790	14,653
Green Lake	3,301	5,451	8,752
Iowa	5,842	4,221	10,063
Iron	1,620	1,734	3,354

County	Gore Vote	Bush Vote	Two Party Total
Jackson	4,380	3,670	8,050
Jefferson	15,203	19,204	34,407
Juneau	4,813	4,910	9,723
Kenosha	32,429	28,891	61,320
Kewaunee	4,670	4,883	9,553
La Crosse	28,455	24,327	52,782
Lafayette	3,710	3,336	7,046
Langlade	4,199	5,125	9,324
Lincoln	6,664	6,727	13,391
Manitowoc	17,667	19,358	37,025
Marathon	26,546	28,883	55,429
Marinette	8,676	10,535	19,211
Marquette	3,437	3,522	6,959
Menominee	949	225	1,174
Milwaukee	252,329	163,491	415,820
City of Milwaukee subtotal	165,598	69,075	234,673
Monroe	7,460	8,217	15,677
Oconto	7,260	8,706	15,966
Oneida	8,339	9,512	17,851
Outagamie	32,735	39,460	72,195
Ozaukee	15,030	31,155	46,185
Pepin	1,854	1,631	3,485
Pierce	8,559	8,169	16,728
Polk	8,961	9,557	18,518

County	Gore Vote	Bush Vote	Two Party Total
Portage	17,942	13,214	31,156
Price	3,413	4,136	7.549
Racine	41.563	44,014	85,577
Richland	3.837	3,994	7,831
Rock	40,472	27,467	67.939
Rusk	3161	3.758	3,161
St. Croix	13077	15,240	13,077
Sauk	13035	11,586	13,035
Sawyer	3333	3,972	3,333
Shawano	7.335	9.548	16.883
Sheboygan	23,569	29,648	53.217
Taylor	3.254	5,278	8.532
Trempealau	6,678	5,002	11,680
Vernon	6.577	5,684	12,261
Vilas	4,706	6,958	11.664
Walworth	15,492	22,982	38,474
Washburn	3,695	3,912	7,607
Washington	18.115	41,162	59.277
Waukesha	64,319	133,105	197,424
Waupaca	8,787	12,980	21,767
Waushara	4.239	5,571	9.810
Winnebago	33,983	38,330	72,313
Wood	15,936	17,803	33,739
	1,242,987	1,237,279	2,480,266

272. In 2004, John Kerry, the Democratic candidate for President, won 1,489,504 votes in Wisconsin to Republican George W. Bush's 1,478,120 votes, winning 50.2% of the two-party vote.

273. In the presidential election nationwide, Bush won 51.24% of the two-party vote to Kerry's 48.76%.

274. The following chart shows the vote totals for Kerry and Bush in each county in Wisconsin, along with a subtotal for votes in the City of Milwaukee.

County	Kerry Vote	Bush Vote	Two Party Total
Adams	5,447	4,890	10,337
Ashland	5,805	3,313	9,118
Barron	11,696	12,030	23,726
Bayfield	5,845	3,754	9,599
Brown	54,935	67,173	122,108
Buffalo	3,998	3,502	7,500
Burnett	4,499	4,743	9,242
Calumet	10,290	14,721	25,011
Chippewa	14,751	15,450	30,201
Clark	6,966	7,966	14,932
Columbia	14,300	14,956	29,256
Crawford	4,656	3,680	8,336
Dane	181,052	90,369	271,421
Dodge	16,690	27,201	43,891
Door	8,367	8,910	17,277

County	Kerry Vote	Bush Vote	Two Party Total
Douglas	16,537	8,448	24,985
Dunn	12,039	10,879	22,918
Eau Claire	30,068	24,653	54,721
Florence	993	1,703	2,696
Fond du Lac	19,216	33,291	52,507
Forest	2,509	2,608	5,117
Grant	12,864	12,208	25,072
Green	9,575	8,497	18,072
Green Lake	3,605	6,472	10,077
Iowa	7,122	5,348	12,470
Iron	1,956	1,884	3,840
Jackson	5,249	4,387	9,636
Jefferson	17,925	23,776	41,701
Juneau	5,734	6,473	12,207
Kenosha	40,107	35,587	75,694
Kewaunee	5,175	5,970	11,145
La Crosse	33,170	28,289	61,459
Lafayette	4,402	3,929	8,331
Langlade	4,751	6,235	10,986
Lincoln	7,484	8,024	15,508
Manitowoc	20,652	23,027	43,679
Marathon	30,899	36,394	67,293
Marinette	10,190	11,866	22,056
Marquette	3,785	4,604	8,389
Menominee	1,412	288	1,700
Milwaukee	297,653	180,287	477,940

County	Kerry Vote	Bush Vote	Two Party Total
City of Milwaukee subtotal	198,907	75,746	274,653
Monroe	8,973	10,375	19,348
Oconto	8,534	11,043	19,577
Oneida	10,464	11,351	21,815
Outagamie	40,169	48,903	89,072
Ozaukee	17,714	34,904	52,618
Pepin	2,181	1,853	4,034
Pierce	11,176	10,437	21,613
Polk	11,173	12,095	23,268
Portage	21,861	16,546	38,407
Price	4,349	4,312	8,661
Racine	48,229	52,456	100,685
Richland	4,501	4,836	9,337
Rock	46,598	33,151	79,749
Rusk	3820	3,985	3,820
St. Croix	18784	22,679	18,784
Sauk	15708	14,415	15,708
Sawyer	4411	4,951	4,411
Shawano	8,657	12,150	20,807
Sheboygan	27,608	34,458	62,066
Taylor	3,829	5,582	9,411
Trempealau	8,075	5,878	13,953
Vernon	7,924	6,774	14,698
Vilas	5,713	8,155	13,868

County	Kerry Vote	Bush Vote	Two Party Total
Walworth	19,177	28,754	47,931
Washburn	4,705	4,762	9,467
Washington	21,234	50,641	71,875
Waukesha	73,626	154,926	228,552
Waupaca	10,792	15,941	26,733
Waushara	5,257	6,888	12,145
Winnebago	40,943	46,542	87,485
Wood	18,950	20,592	39,542
	1,489,504	1,478,120	2,967,624

275. In 2008, Barack Obama, the Democratic candidate for President, won 1,677,211 votes in Wisconsin to Republican John McCain's 1,262,393 votes, winning 57.05% of the two– party vote.

276. In the presidential election nationwide, Obama won 53.69% of the two-party vote to McCain's 46.31%.

277. The following chart shows the vote totals for Obama and McCain in each county in Wisconsin including a subtotal of votes in the City of Milwaukee.

County	Obama Vote	McCain Vote	Two Party Total
Adams	5,806	3,974	9,780
Ashland	5,818	2,634	8,452

County	Obama Vote	McCain Vote	Two Party Total
Barron	12,078	10,457	22,535
Bayfield	5,972	3,365	9,337
Brown	67,269	55,854	123,123
Buffalo	3,949	2,923	6,872
Burnett	4,337	4,200	8,537
Calumet	13,295	12,722	26,017
Chippewa	16,239	13,492	29,731
Clark	7,454	6,383	13,837
Columbia	16,661	12,193	28,854
Crawford	4,987	2,830	7,817
Dane	205,984	73,065	279,049
Dodge	19,183	23,015	42,198
Door	10,142	7,112	17,254
Douglas	15,830	7,835	23,665
Dunn	13,002	9,566	22,568
Eau Claire	33,146	20,959	54,105
Florence	1,134	1,512	2,646
Fond du	23,463	28,164	51,627
Forest	2,673	1,963	4,636
Grant	14,875	9,068	23,943
Green	11,502	6,730	18,232
Green Lake	4,000	5,393	9,393
Iowa	7,987	3,829	11,816
Iron	1,914	1,464	3,378
Jackson	5,572	3,552	9,124
Jefferson	21,448	21,096	42,544

County	Obama Vote	McCain Vote	Two Party Total
Juneau	6,186	5,148	11,334
Kenosha	45,836	31,609	77,445
Kewaunee	5,902	4,711	10,613
La Crosse	38,524	23,701	62,225
Lafayette	4,732	2,984	7,716
Langlade	5,182	5,081	10,263
Lincoln	8,424	6,519	14,943
Manitowoc	22,428	19,234	41,662
Marathon	36,367	30,345	66,712
Marinette	11,195	9,726	20,921
Marquette	4,068	3,654	7,722
Menominee	1,257	185	1,442
Milwaukee	319,819	149,445	469,264
City of Milwaukee subtotal	213,436	57,665	271,101
Monroe	10,198	8,666	18,864
Oconto	9,927	8,755	18,682
Oneida	11,907	9,630	21,537
Outagamie	50,294	39,677	89,971
Ozaukee	20,579	37,172	57,751
Pepin	2,102	1,616	3,718
Pierce	11,803	9,812	21,615
Polk	10,876	11,282	22,158
Portage	24,817	13,810	38,627
Price	4,559	3,461	8,020

County	Obama Vote	McCain Vote	Two Party Total
Racine	53,408	45,954	99,362
Richland	5,041	3,298	8,339
Rock	50,529	27,364	77,893
Rusk	3855	3,253	3,855
St. Croix	21177	22,837	21,177
Sauk	18617	11,562	18,617
Sawyer	4765	4,199	4,765
Shawano	10,259	9,538	19,797
Sheboygan	30,395	30,801	61,196
Taylor	4,563	4,586	9,149
Trempealau	8,321	4,808	13,129
Vernon	8,463	5,367	13,830
Vilas	6,491	7,055	13,546
Walworth	24,177	25,485	49,662
Washburn	4,693	4,303	8,996
Washington	25,719	47,729	73,448
Waukesha	85,339	145,152	230,491
Waupaca	12,952	12,232	25,184
Waushara	5,868	5,770	11,638
Winnebago	48,167	37,946	86,113
Wood	21,710	16,581	38,291
	1,677,211	1,267,393	2,944,604

278. In 2008, Democratic candidates for the Assembly ran about three points behind Obama in the statewide two–party vote.

279. In 2012, Barack Obama, the Democratic candidate for President, won 1,620,985 votes in Wisconsin to Republican Mitt Romney's 1,407,966 votes, winning 53.5% of the two- party vote.

280. In the presidential election nationwide, Obama won 51.96% of the two-party vote to Romney's 48.04%.

281. The following chart shows the vote totals for Obama and Romney in each county in Wisconsin along with a subtotal for the votes in the City of Milwaukee.

County	Obama Vote	Romney Vote	Two Party Total
Adams	5,542	4,644	10,186
Ashland	5,399	2,820	8,219
Barron	10,890	11,443	22,333
Bayfield	6,033	3,603	9,636
Brown	62,526	64,836	127,362
Buffalo	3,570	3,364	6,934
Burnett	3,986	4,550	8,536
Calumet	11,489	14,539	26,028
Chippewa	15,237	15,322	30,559
Clark	6,172	7,412	13,584
Columbia	17,175	13,026	30,201
Crawford	4,629	3,067	7,696
Dane	216,071	83,644	299,715

County	Obama Vote	Romney Vote	Two Party Total
Dodge	18,762	25,211	43,973
Door	9,357	8,121	17,478
Douglas	14,863	7,705	22,568
Dunn	11,316	10,224	21,540
Eau Claire	30,666	23,256	53,922
Florence	953	1,645	2,598
Fond du Lac	22,379	30,355	52,734
Forest	2,425	2,172	4,597
Grant	13,594	10,255	23,849
Green	11,206	7,857	19,063
Green Lake	3,793	5,782	9,575
Iowa	8,105	4,287	12,392
Iron	1,784	1,790	3,574
Jackson	5,298	3,900	9,198
Jefferson	20,158	23,517	43,675
Juneau	6,242	5,411	11,653
Kenosha	44,867	34,977	79,844
Kewaunee	5,153	5,747	10,900
La Crosse	36,693	25,751	62,444
Lafayette	4,536	3,314	7,850
Langlade	4,573	5,816	10,389
Lincoln	7,563	7,455	15,018
Manitowoc	20,403	21,604	42,007
Marathon	32,363	36,617	68,980
Marinette	9,882	10,619	20,501
Marquette	4,014	3,992	8,006

County	Obama Vote	Romney Vote	Two Party Total
Menominee	1,191	179	1,370
Milwaukee	332,438	154,924	487,362
City of Milwaukee subtotal	227,384	56,553	283,937
Monroe	9,515	9,675	19,190
Oconto	8,865	10,741	19,606
Oneida	10,452	10,917	21,369
Outagamie	45,659	47,372	93,031
Ozaukee	19,159	36,077	55,236
Pepin	1,876	1,794	3,670
Pierce	10,235	10,397	20,632
Polk	10,073	12,094	22,167
Portage	22,075	16,615	38,690
Price	3,887	3,884	7,771
Racine	53,008	49,347	102,355
Richland	4,969	3,573	8,542
Rock	49,219	30,517	79,736
Rusk	3397	3,676	3,397
St. Croix	19910	25,503	19,910
Sauk	18736	12,838	18,736
Sawyer	4486	4,442	4,486
Shawano	9,000	11,022	20,022
Sheboygan	27,918	34,072	61,990
Taylor	3,763	5,601	9,364
Trempealau	7,605	5,707	13,312

County	Obama Vote	Romney Vote	Two Party Total
Vernon	8,044	5,942	13,986
Vilas	5,951	7,749	13,700
Walworth	22,552	29,006	51,558
Washburn	4,447	4,699	9,146
Washington	23,166	54,765	77,931
Waukesha	78,779	162,798	241,577
Waupaca	11,578	14,002	25,580
Waushara	5,335	6,562	11,897
Winnebago	45,449	42,122	87,571
Wood	18,581	19,704	38,285
	1,620,985	1,407,966	3,028,951

282. In 2012, Obama won Milwaukee, Dane and Rock Counties with 69% of the two- party vote but won only 47% of the two-party vote in the rest of the state (to Mitt Romney's 53%), a difference of twenty–two percentage points.

283. In the November 2010 election, Republican candidates won the Governor's office, a majority in the State Senate and retook the majority in the Assembly.

284. In the November 2010 election, Scott Walker won the Governor's office with 52.25% of the total vote (52.9% of the two–party vote).

285. In the November 2010 election, Republicans won 60 seats in the Assembly.

286. Professor Jackman calculates that the Republican candidates for the Assembly won 53.5% of the statewide two–party vote share in the November 2010 election.

287. On June 5, 2012, Governor Walker survived a recall attempt with 53.08% of the vote (53.4% of the two–party vote).

288. In November of 2012, President Obama won Wisconsin in the presidential election with 52.83% of the total vote (53.5% of the two–party vote).

289. Wisconsin's Democratic candidates for the Assembly ran about two points behind the President's vote share: Professor Jackman calculates that Democrats had a two–party vote share of 51.4%.

290. In November of 2014, the Republicans increased their control of the Assembly by winning 63 seats, equating to a 63.6% seat share. Professor Jackman calculates that Republican candidates for the Assembly won 52% of the statewide two–party vote share in the November 2014 elections.

291. In 2010, Bob Ziegelbauer won assembly district 25, and even though he ran as an independent, he typically voted with Republicans. Jason Stein & Patrick Marley, *More than They*

Bargained For: Scott Walker, Unions, and the Fight for Wisconsin, Earle Decl. Ex. G (Dkt. 57- 7) at 119.

292. Mr. Trende admitted that there are no "peer-reviewed studies that have analyzed the geographic clustering of Democratic and Republican voters by examining trends in counties won by each part[y's] presidential candidate." Trende Dep. (Dkt. 66) at 51:6-11.

293. Mr. Trende admitted that the maps he relied upon make no adjustment for counties' very different populations. Trende Dep. (Dkt. 66) at 52:25-53:3; Goedert Dep. (Dkt. 65) at 186:5-7.

294. Mr. Trende admitted that the maps he relied on do not display each party's margin of victory in each county. Trende Dep. (Dkt. 66) at 52:3-6.

295. Mr. Trende admitted that the maps he relied on are based on presidential rather than state legislative election results. Trende Dep. (Dkt. 66) at 53:25-54:13, 56:9-58:9.

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STIPULATIONS OF WITNESS QUALIFICATIONS

Professor Kenneth Mayer, Ph.D.

299. Kenneth Mayer is a Professor of Political Science at the University of Wisconsin-Madison, and a faculty affiliate at the University's La Follette School of Public Affairs.

300. Dr. Mayer teaches courses on American politics, the presidency, Congress, campaign finance, election law, and electoral systems.

301. From 1996 to 2000, Dr. Mayer served as an Associate Professor in the Department of Political Science at the University of Wisconsin-Madison.

302. From 1989 through 1996, Dr. Mayer was an Assistant Professor in the Department of Political Science at the University of Wisconsin-Madison.

303. Dr. Mayer received a Ph.D. in Political Science from Yale University in 1988, where his graduate training included courses in econometrics and statistics.

304. Dr. Mayer received a M.A., M.Phil. in Political Science from Yale University in 1987.

305. Dr. Mayer received a B.A. in Political Science from the University of California, San Diego

in 1982, where he majored in Political Science and minored in Applied Mathematics.

306. Dr. Mayer has testified at trial or at deposition in the following cases, among others: *Baldus et al. v. Brennan et al.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012); *Milwaukee Branch of the NAACP et al. v. Walker et al.*, 2014 WI 98, 357 Wis. 2d 469, 851 N.W. 2d 262; *McComish et al. v. Brewer et al.*, No.CV-08-1550, 2010 WL 2292213 (D. Ariz. June 23, 2010); and *Kenosha County v. City of Kenosha*, No. 11-CV-1813 (Kenosha County Circuit Court, Kenosha, WI, 2011).

307. Dr. Mayer served as a consultant and expert witness in *Baumgart et al. v. Wendelberger* et al., No. 01–C–0121, 2002 WL 34127471 (E.D. Wis. May 30, 2002).

308. From 2003 to 2009, Dr. Mayer was Co-Chair of the Committee on Redistricting for the Supreme Court of Wisconsin.

309. Dr. Mayer served as an expert consultant for Prosser for Supreme Court (2011 Wisconsin Supreme Court recount).

310. In 2011, Dr. Mayer served as an expert consultant for Voces de la Frontera in the Milwaukee aldermanic redistricting process.

311. Dr. Mayer is currently serving as an expert witness in the ongoing voting rights case *One Wisconsin Institute, Inc. et al. v. Nichol, et al.*, 3:15-cv-324 (W.D. Wis.).

312. Dr. Mayer was part of a research group that consulted for the G.A.B., where he reviewed the G.A.B.'s compliance with federal mandates and reporting systems and surveyed local election practices throughout the state of Wisconsin, resulting in a 2009 report to the G.A.B.

313. Dr. Mayer serves on the Steering Committee of the Wisconsin Elections Research Center, a part of the University of Wisconsin-Madison College of Letters and Science.

314. Dr. Mayer served on the Education and Social Behavioral Sciences Institutional Review Board from 2009-2014, holding the position of Acting Chair in 2011 and Chair from 2012-2014.

315. The U.S. Department of Justice retained Dr. Mayer in 2012 to analyze data and methods regarding election practices in the state of Florida.

316. In 2006, Dr. Mayer was the Fulbright-ANU Distinguished Chair in Political Science at Australian National University.

317. From 1996-2003, Dr. Mayer served as the Director of the Data and Computation Center at the

College of Letters and Science at the University of Wisconsin-Madison.

318. Dr. Mayer served as a consultant to the RAND Corporation from 1988-1994.

319. From 1985-1986, Dr. Mayer was a Contract Specialist for the Naval Air Systems Command in Washington, D.C.

320. Dr. Mayer has published numerous articles on American politics, the presidency, Congress, campaign finance, election law, and electoral systems in the following peer-reviewed journals: Journal of Politics, American Journal of Political Science, Election Law Journal, Legislative Studies Quarterly, Presidential Studies Quarterly, American Politics Research, Congress and the Presidency, Public Administration Review, and PS: Political Science.

321. Dr. Mayer has also published in several law reviews, including the Richmond Law Review, UCLA Pacific Basin Law Journal, and University of Utah Law Review.

322. An article written by Dr. Mayer and several colleagues, titled "Election Laws, Mobilization, and Turnout," won the award Best Journal Article Published in the American Journal of Political Science in 2014, from the American Political Science Association, State Politics and Policy Section.

323. In 2013, an article written by Dr. Mayer and colleagues titled "Election Laws and Partisan Gains," won the Robert H. Durr Award from the Midwest Political Science Association for the Best Paper Applying Quantitative Methods to a Substantive Problem.

324. Dr. Mayer has won several other honors and awards, including Leo Epstein Faculty Fellow, College of Letters and Science (2012-2015), the Jerry J. and Mary M. Cotter Award, College of Letters and Science (2011-2012), the Alliant Underkofler Excellence in Teaching Award, University of Wisconsin System (2006), and the Pi Sigma Alpha Teaching Award (2006), among others.

325. Dr. Mayer has published and edited numerous books, including *The 2012 Presidential Election: Forecasts, Outcomes, and Consequences* (2014), *The Enduring Debate: Classic and Contemporary Reading in American Government* (7th ed. 2013), *Faultlines: Readings in American Government* (4th ed. 2013), and *With the Stroke of a Pen: Executive Orders and Presidential Power* (2001), among others.

326. From 2001-2006, Dr. Mayer served as a Book Review Editor for Congress and the Presidency.

327. From 2001-2007, Dr. Mayer was on the Editorial Board of the American Political Science Review.

328. Dr. Mayer is the recipient of a number of research grants including, among others, the Graduate School Research Committee at the University of Wisconsin (2015-2016), Wisconsin Government Accountability Board (2011-2012), Open Society Institute (2010), Pew Charitable Trusts (2008-2009), Joyce Foundation (2008), JEHT Foundation (2006-2007), National Science Foundation (1995-1998), and the McArthur Foundation (1992-1995).

329. Dr. Mayer has also presented at numerous conferences and events, including the American Political Science Association Annual Meeting, Midwest Political Science Association Meeting, Foreign Fulbright Enrichment Seminar, Reed College Public Policy Lecture Series, Southern Political Science Association Meeting, Miller Center for Public Affairs at the University of Virginia, and the American Politics Seminar at George Washington University, among others.

Professor Simon Jackman, Ph.D.

330. Simon Jackman is a Professor in the Department of Political Science and (by courtesy) the Department of Statistics at Stanford University.

331. Dr. Jackman teaches courses on American politics and statistical methods in social sciences.

332. Dr. Jackman also currently serves as Chief Executive Officer of the United States Studies Centre at the University of Sydney.

333. From 2002 through 2007, Dr. Jackman was an Associate Professor in the Department of Political Science and (by courtesy) the Department of Statistics at Stanford University.

334. From 1996 through 2002, Dr. Jackman was an Assistant Professor in the Department of Political Science at Stanford University.

335. Dr. Jackman was a Visiting Professor at the United States Studies Centre at the University of Sydney from 2008 to 2009 and 2010 to 2013.

336. From 1994 to 1996, Dr. Jackman was an Assistant Professor in the Department of Political Science at the University of Chicago.

337. Dr. Jackman received his Ph.D. in Political Science from the University of Rochester in 1995, where his graduate training included courses in econometrics and statistics.

338. From 1991-1994, Dr. Jackman was a Visiting Doctoral Student at the Woodrow Wilson School of International and Public Affairs at Princeton University.

339. Dr. Jackman received his B.A. (with first class Honours in Government) from the University of Queensland in 1988.

340. Dr. Jackman has published numerous articles on American politics, election law, and electoral systems in the following peer-reviewed journals: The Journal of Politics, Electoral Studies, The American Journal of Political Science, Legislative Studies Quarterly, Election Law Journal, Public Opinion Quarterly, Journal of Elections, Public Opinion and Parties, and PS: Political Science and Politics.

341. Dr. Jackman authored the articles "Bayesian Analysis for Political Research," Annual Reviews of Political Science (2004), and "Estimation and Inference via Bayesian Simulation: an Introduction to Markov Chain Monte Carlo," American Journal of Political Science (2002), among other articles on political science and quantitative methods.

342. Dr. Jackman is the author of *Bayesian Analysis for the Social Sciences* (2009).

343. In 2014, Dr. Jackman served as a Program Chair at the Annual Meeting of the American Political Science Association.

344. Dr. Jackman served as a Principal Investigator for the American National Election Studies from 2009 to 2013.

345. From 2007-2008, Dr. Jackman was a Principal Investigator for the Co-Operative Campaign Analysis Project.

346. From 2003 to 2005, Dr. Jackman served as President of the Society for Political Methodology.

347. From 2003 to 2006, Dr. Jackman was the Director of Graduate Studies from the Department of Political Science at Stanford University.

348. Dr. Jackman was elected as a Fellow to the American Academy of Arts and Sciences in 2013.

349. Dr. Jackman has received numerous other awards and honors, including, among others: the Gregory M. Luebbert Prize for Best Article in Comparative Politics Published in 2008 or 2009, from the Comparative Politics Section of the American Political Science Association, the Journal of Politics 2006 Best Paper Award, at the Southern Political Science Association, the New South Wales Residency Expatriate Researchers Award, University of Sydney, and the Dean's Award for Distinguished Teaching at Stanford University, School of Humanities and Sciences at Stanford University (2001).

350. Dr. Jackman has received several prestigious research grants from the National Science Foundation, including in 2010, 2001, and 1999.

351. In 2014, Dr. Jackman served as a consultant to Facebook on the design and analysis of surveys.

352. From 2012 to 2013, Dr. Jackman consulted for the Huffington Post on the matters of tracking and forecasting public opinion leading up to the 2012 presidential campaign.

353. Dr. Jackman served as a consultant for the Federal Communications Commission from 2010 to 2011, assessing how media impacts public opinion and public engagement using Bayesian modeling.

354. Dr. Jackman has been an Associate Editor for several editorial journals, including the Annual Review of Political Science (2005-2013) and Political Analysis (2010 to the present).

355. Dr. Jackman has provided editorial board service to several journals, including the American Political Science Review (current), American Journal of Political Science, Journal of Politics, Electoral Studies, Australian Journal of Political Science (current), Public Opinion Quarterly (current), and Political Analysis.

356. Dr. Jackman has been invited to speak at numerous lectures, seminars, and workshops, including the Asian Political Methodology Conference, the ACSPRI Social Science Methodology Conference, the Australian Political Studies Association Conference, the Society for Political Methodology, the Munk School of Global Affairs, the Massachusetts Institute of Technology, the Research Triangle Institute, Nuffield College, TEDx Sydney, the International Political Science Association, Stanford University Law School, Princeton University, Harvard University, Yale University, and Vanderbilt University.

357. Dr. Jackman helped develop the software package pscl, a package of classes and methods for R developed in the Political Science Computational Laboratory at Stanford University.

358. Dr. Jackman has served as a Reviewer for the National Research Council, Chair for the Emerging Scholar Committee at the University of Sydney, on the James Madison Awards Committee at the American Political Science Association, Chair of the Distinguished Career Achievement Award Committee for the Society for Political Methodology, and President of the Society for Political Methodology and the Political Methodology Section of the American Political Science Association, among other services to the political science field.

Sean Trende

359. Trende received a B.A. from Yale University in 1995, with distinction, with a double major in history and political science.

360. Trende received a J.D. from Duke University in 2001, cum laude.

361. Trende received an M.A. from Duke University in 2001, cum laude, in political science.

362. Trende joined RealClearPolitics in January of 2009 as its Senior Elections Analyst. He assumed a fulltime position with RealClearPolitics in March of 2010 and continues as its Senior Elections Analyst.

363. RealClearPolitics is one of the most heavily trafficked political websites in the world.

364. RealClearPolitics provides political analysis and poll aggregation.

365. RealClearPolitics has a readership in excess of 1 million.

366. Trende's work has been cited by David Brooks of The New York Times, Brit Hume of Fox News, Michael Barone of The Almanac of American Politics, Paul Gigot of The Wall Street Journal, and Peter Beinart of The Atlantic.

367. Trende's responsibilities with RealClearPolitics consist of tracking, analyzing, and writing about elections. Trende is in charge of rating the competitiveness of House of Representatives races, and he collaborates in rating the competitiveness of Presidential, Senate and gubernatorial races.

368. Trende's responsibilities also include studying and writing about legislative redistricting, and supervising and editing the work of RealClearPolitics' elections analyst David Byler.

369. Trende regularly writes columns for RealClearPolitics and has written on partisan gerrymandering and geographic clustering. He has hundreds of articles available online.

370. Trende's readers include political science professors, members of the media, elected representatives, and others.

371. Trende is a Senior Columnist for Dr. Larry Sabato's "Crystal Ball" and has written for the Crystal Ball since January 2014. Dr. Sabato is a professor of political science at the University of Virginia and serves as the director of the University of Virginia Center for Politics.

372. Trende authored a chapter in Dr. Larry Sabato's *Barack Obama and the New America: The 2012 Election and the Changing Face of Politics*, ch.

12 (2013), which discussed the demographic shifts accompanying the 2012 elections.

373. Trende authored a chapter in Dr. Sabato's *The Surge: 2014's Big GOP Win and What It Means for the Next Presidential Election*, ch. 12 (2015), which discusses demographics and Electoral College shifts.

374. Trende is the author of *The Lost Majority: Why the Future of Government is up For Grabs and Who Will Take It* (2012). It includes analysis of demographic and political trends beginning around 1920 and continuing through the modern times.

375. Trende co-authored the *Almanac of American Politics* 2014 (2013). Trende's focus was researching the history of and writing descriptions for many of the newly-drawn congressional districts.

376. Trende has served as a peer reviewer for articles for the political science journals Party Politics and PS.

377. Trende has spoken before the Heritage Foundation, the American Enterprise Institute, the CATO Institute, the Bipartisan Policy Center, and the Brookings Institution.

378. In 2012, Trende was invited to Brussels to speak about American elections to the European External Action Service, which is the European Union's diplomatic corps.

379. Trende's presentations have included: "The Lost Majorities: 2008, 2010 and America's Political Future," Bradley Lecture, American Enterprise Institute, January 2012; Panelist, "The Future of Red and Blue," Bipartisan Policy Center, Washington, DC, April 2012; "The 2012 Elections: Trends, Prognostications and What's at Stake," 3rd Annual Family Office Wealth Management Forum, Greensboro, Georgia, May 2012; "2012 U.S. Election Series," with Bruce Stokes and Alexandra de Hoop Scheffer, German Marshall Fund, Brussels, Belgium, Oct. 4, 2012

380. Trende has appeared on Fox News and MSNBC to discuss electoral and demographic trends.

381. Trende has spoken on radio shows including First Edition with Sean Yoes, the Diane Rehm Show, the Brian Lehrer Show, the John Batchelor Show, the Bill Bennett Show, Beijing Radio, CNN Radio, NPR, and Fox News Radio.

382. Trende has been cited in publications including The New York Times, The Washington Post, The Los Angeles Times, The Wall Street Journal, and USA Today.

383. Trende sits on the advisory panel for the "States of Change: Demographics and Democracy" project, which is a three-year project sponsored by the Hewlett Foundation involving the Brookings Institution, the American Enterprise Institute, and

the Center for American Progress. The group looks at trends among eligible voters and the overall population, both nationally and in some states.

384. Trende has drawn, using Adobe Illustrator, complete maps of every congressional district ever drawn, dating back to 1789.

385. Trende authored an expert report in Dickson v. Rucho, No. 11-CVS-16896 (N.C. Super Ct., Wake County), regarding partisanship of various districts, and that report was accepted without objection.

386. Trende authored two expert reports in *NAACP v. McCrory*, No. 1:13CV658 (M.D.N.C.), which involves challenges to North Carolina's voter laws, and also testified.

387. Trende authored an expert report in *NAACP v. Husted*, No. 2:14-cv-404 (S.D. Ohio), and in a later iteration of that litigation, *Ohio Democratic Party v. Husted*, No. 2:15-CV- 1802 (S.D. Ohio), and testified at trial.

Professor Nicholas Goedert, Ph.D.

388. Dr. Goedert is currently a Visiting Assistant Professor of political science at Lafayette College in Easton, Pennsylvania.

389. Dr. Goedert has accepted a tenure track professor position in political science at the Virginia Polytechnic Institute and State University (Virginia Tech) starting next school year.

390. In 2012, Dr. Goedert received a Ph.D. from the Department of Politics, Princeton University.

391. Dr. Goedert's dissertation regarding congressional redistricting is titled: "Gerrymandering, Electoral Uncertainty, and Representation." His advisors were Brandice Canes-Wrone (chair), Nolan McCarty, and Adam Meirowitz.

392. Dr. Goedert's graduate training included coursework on quantitative methods and statistics.

393. In 2009, Dr. Goedert received a M.A. from the Department of Politics, Princeton University.

394. His examination fields were American Politics (Public Opinion, Political Psychology, and Legislative Politics), Formal and Quantitative Methodology.

395. In 2006, Dr. Goedert received a J.D. (cum laude) from Georgetown University Law Center. He specialized in election law.

396. In 2001, Dr. Goedert received a B.A. (magna cum laude) from the Department of Social Studies, Harvard University.

397. From 2014 to the present, Dr. Goedert is employed as Visiting Assistant Professor, Department of Government and Law, Lafayette College.

398. From 2012 to 2014, Dr. Goedert was a Postdoctoral Research Associate, Department of Political Science at Washington University in St. Louis.

399. Dr. Goedert's peer-reviewed publications include:

a. "The Pseudo-Paradox of Partisan Mapmaking and Congressional Competition," conditionally accepted at State Politics and Policy Quarterly (2016).

b. "The Case of the Disappearing Bias: A 2014 Update to the 'Gerrymandering or Geography' Debate," forthcoming in Research & Politics (2016 research note).

c. "Redistricting, Risk, and Representation: How Five State Gerrymanders Weathered the Tides of the 2000's." Election Law Journal 13(3): 406-418 (2014).

d. "Gerrymandering or Geography?: How Democrats Won the Popular Vote but Lost the Congress in 2012." Research & Politics 1(1): 2053168014528683 (2014).

400. Dr. Goedert's working papers include:

a. "Redistricting Institutions, Partisan Tides, and Congressional Competition"

b. "Southern Redistricting under the VRA: A Model of Partisan Tides"

c. "Gerrymandering and Competing Norms of Representation"

d. "Democratic Incumbent Resilience in the Post-1980 Senate: A Theory of Partisan Issue Competence"

e. "The Impact of Geographic Constituencies on Regional Parties: Evidence from Six Nations"

401. Dr. Goedert's conference presentations include:

a. Gerrymandering, Polarization, and Competing Norms of Representation," presented at the Annual Meeting of the American Political Science Association, Washington, DC (2014).

b. "Democratic Incumbent Resilience in the Post-1980 Senate: A Theory of Partisan Issue Competence," presented at the Annual

Conference of the Midwest Political Science Association, Chicago, IL (2014).

c. "Gerrymandering and Competing Norms of Representation," presented at the Annual Conference of the Midwest Political Science Association, Chicago, IL (2012).

d. "Southern Redistricting under the VRA: A Model of Partisan Tides," presented at the State Politics and Policy Conference, Houston, TX (2012).

e. "Redistricting Institutions under Electoral Uncertainty," presented at the Annual Meeting of the American Political Science Association, Seattle, WA (2011).

f. "Redistricting Institutions, Partisan Tides, and Congressional Turnover," presented at the State Politics and Policy Conference, Hanover, NH (2011), the Annual Conference of the MPSA, Chicago, IL, and the Society for Political Methodology Summer Meeting, Princeton, NJ.

402. Dr. Goedert is a contributor to political science blogs at The Washington Post, The Monkey Cage and Wonkblog.

403. Dr. Goedert has written a non-peer-reviewed short article titled "Not Gerrymandering,

but Districting: More Evidence on How Democrats Won the Popular Vote but Lost the Congress" for The Monkey Cage (Nov. 15, 2012).

404. Dr. Goedert's teaching experience includes, as a Visiting Professor, "Introduction to United States Politics" (Fall 2014); "Political Opinion and Participation in the United States" (Fall 2014 and Spring 2016); "Campaigns and Elections" (Spring 2015 and Fall 2015); "Congress and the Legislative Process" (Fall 2015); "Constitutional Law and Politics in the United States" (Spring 2016 (scheduled)); "Representation, Apportionment, and Democratic Participation" (Spring 2015 and Spring 2016).

405. Dr. Goedert has served as a Legislative Analyst for the Maryland General Assembly, Department of Legislative Services, from 2006-2007.

406. Dr. Goedert has served as a manuscript reviewer for Legislative Studies Quarterly; State Politics and Policy Quarterly; Election Law Journal; and Social Influence.

* * *

Cross-References to Supplemental Appendix

Plaintiffs' Trial Exhibit 93: Expert Analysis by Professor Simon Jackman, Sensitivity of the Efficiency Gap to Uniform Swing appears at: SA315–320

Plaintiffs' Trial Exhibit 122: Expert Analysis by Professor Simon Jackman, Average Efficiency Gaps for Wisconsin Plans (1970s-2010s) appears at: SA321

Plaintiffs' Trial Exhibit 134: Memo by Keith Gaddie, dated April 17, 2011, Wisconsin_Partisanship appears at: SA322

Plaintiffs' Trial Exhibit 172: Plan Comparisons spreadsheet appears at: SA323–327

Plaintiffs' Trial Exhibit 237: Memo by Tad Ottman, Questions and Responses appears at: SA328–329

Plaintiffs' Trial Exhibit 241: Memo by Tad Ottman, Redistricting is not something that we have discretion on appears atSA330–332

Plaintiffs' Trial Exhibit 243: Confidentiality and Nondisclosure Related to Reapportionment Agreements between Michael Best & Friedrich and 16 Senators (Excerpt) appears at: SA333

Plaintiffs' Trial Exhibit 244: Confidentiality and Nondisclosure Related to Reapportionment Agreements between Michael Best & Friedrich and 58

Assembly Representatives (Excerpt) appears at: SA334

Plaintiffs' Trial Exhibit 272: Composite_Adam_Assertive_Curve (Excerpt: Composite tab) appears at: SA335

Plaintiffs' Trial Exhibit 273: Composite_Current_Curve (Excerpt: Composite tab) appears at: SA336

Plaintiffs' Trial Exhibit 274: Composite_Joe_Assertive_Curve (Excerpt: Composite tab) appears at: SA337

Plaintiffs' Trial Exhibit 280: TadAggressiveCurve appears at: SA338

Plaintiffs' Trial Exhibit 282: Team_Map_Curve appears at: SA339

Plaintiffs' Trial Exhibit 283: Summaries (Excerpt: Columns AG to BL, Rows 1 to 66) appears at: SA340–343

Plaintiffs' Trial Exhibit 284: Summary appears at: SA344–345

Plaintiffs' Trial Exhibit 325B: Expert Analysis by Professor Simon Jackman, EG and Partisan Bias appears at: SA346

Plaintiffs' Trial Exhibit 329: Expert Analysis by Professor Simon Jackman, EG and PB on Same Chart appears at: SA347

Plaintiffs' Trial Exhibit 342: Memoranda to Republican Legislators from Adam Foltz, dated June 19, 2011, re: New Map (Excerpted for District 1) appears at: SA348–351

Plaintiffs' Trial Exhibit 348: Email from Jim Troupis to Eric McLeod, dated June 21, 2011, re: Experts appears at: SA352

Plaintiffs' Trial Exhibit 364: Tad MayQandD appears at: SA353

Plaintiffs' Trial Exhibit 366: Joe Assertive appears at: SA354

Plaintiffs' Trial Exhibit 463: Proposed Map Room Access Policy appears at: SA355

Plaintiffs' Trial Exhibit 467: Team Map appears at: SA356–358

Plaintiffs' Trial Exhibit 487: Seats appears at: SA359

Plaintiffs' Trial Exhibit 495: Expert Analysis by Professor Simon Jackman, Wisconsin Sensitivity Testing appears at: SA360

Defendants' Trial Exhibit 502: Map of Act 43 appears at: SA361

Defendants' Trial Exhibit 505: Map Showing Prior Plan (2002-2010) Assembly Districts' Deviation from Ideal Population Following 2010 Census appears at: SA362

Defendants' Trial Exhibit 515: Prior Plan (2002-2010) Assembly District Map appears at: SA363

Order Postponing Consideration of the Question of Jurisdiction

No. 16-1161	
Title:	Beverly R. Gill, et al., Appellants v. William Whitford, et al.
Docketed:	March 24, 2017
Linked with 16A1149	
Lower Ct:	United States District Court for the Western District of Wisconsin
Case Nos.:	(15-cv-421-bbc)
Decision Date:	November 21, 2016

~~Date~~~	~~~~~Proceedings and Orders~~~~~
* * *	
Jun 19 2017	Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits.